Federal Court  Cour fédérale

Date: 20220620

Docket: IMM-4002-21

Citation: 2022 FC 927

Ottawa, Ontario, June 20, 2022

PRESENT: Mr. Justice McHaffie

BETWEEN:

THU NGAN DO, DINH LINH NGUYEN, MINH NGOC NGUYEN, AND MANH DUNG NGUYEN BY HIS LITIGATION GUARDIAN THU NGAN DO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Thu Ngan Do is an experienced financial professional. For the past 20 years, she has pursued a career in finance in her native Vietnam, including in senior positions with international banking and accounting firms. Interested in immigrating to Canada with her family, she was put in contact with a robotics technology company in Halifax, which offered her a position as a

financial analyst. The Province of Nova Scotia nominated Ms. Do for its Provincial Nominee Program (PNP). However, a visa officer with Immigration, Refugees and Citizenship Canada (IRCC) concluded she did not genuinely intend to reside in Nova Scotia and refused her application for permanent residence under the provincial nominee class.

[2] I conclude that the visa officer's decision does not bear the attributes of a reasonable decision. The visa officer's primary rationale, that Ms. Do's prior employment was not consistent with someone who would take a lesser position as a financial analyst, failed to account for her explanation that she was willing to make this "trade off" between family and career to benefit her children. The visa officer's decision was also unfair, as it reached a central finding regarding Ms. Do's credibility, namely that her declaration of her intention to reside in Nova Scotia was not a genuine one, without giving her adequate notice of this credibility concern so she could respond to it.

[3] The application for judicial review will therefore be allowed. The visa officer's decision dated May 26, 2021 refusing the applicants' application for permanent residence will be set aside and remitted for redetermination.

II. Issues and Standard of Review

[4] The applicants challenge both the merits of the visa officer's decision and the fairness of the process leading to that decision. The merits are to be reviewed on the standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25; *Tran v Canada (Citizenship and Immigration)*, 2021 FC 721 at para 16. The

procedural fairness issue is reviewed by asking whether the process leading to the decision was fair in all the circumstances: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54-55; *Tran* at para 16.

[5] The issues on this application for judicial review are therefore the following:

A. Was the visa officer's decision reasonable?

B. Was the process leading to the visa officer's decision fair?

III. Analysis

A. *The Visa Officer's Decision was Unreasonable*

(1) The application for permanent residence

[6] The four applicants in this application are Ms. Do, her husband, Dinh Linh Nguyen, and their two children, a daughter born in 1996 and a son born in 2004. Ms. Do has an MBA and works in the financial sector in Ho Chi Minh City. Her positions have included five years spent as the Chief Finance Officer with JP Morgan Chase Bank, a year and a half as First Deputy Chief Executive Officer with Thanh Thanh Cong Group and, since 2020, Finance Director at PricewaterhouseCoopers (PwC). Mr. Nguyen is retired from a position with the Vietnamese government.

[7] In 2018, Ms. Do thought about her plans for her and her family, and looked into applying for a job in Canada. An immigration consultant put her in touch with Pleiades Robotics, Inc (now known as Spiri Robotics, Inc), a Nova Scotia company working in robotics and drone

technology. In September 2018, Pleiades offered Ms. Do a job as a financial analyst, a position falling within the "Financial and Investment Analysts" classification in the National Occupational Classification (NOC) system. She applied for nomination under Nova Scotia's PNP on the strength of this offer in October 2018.

[8] In November 2018, Nova Scotia confirmed Ms. Do's nomination for its PNP as a skilled worker and supported her application for a temporary work permit. She applied for permanent residence in May 2019 as a member of the provincial nominee class, a class prescribed in section 87 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*] as an economic class under subsection 12(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Subsection 87(2) of the *IRPR* describes a member of the provincial nominee class as follows:

Member of the class	**Qualité**
87 (2) A foreign national is a member of the provincial nominee class if	**87 (2)** Fait partie de la catégorie des candidats des provinces l'étranger qui satisfait aux critères suivants :
(a) subject to subsection (5), they are named in a nomination certificate issued by the government of a province under a provincial nomination agreement between that province and the Minister; and	**a)** sous réserve du paragraphe (5), il est visé par un certificat de désignation délivré par le gouvernement provincial concerné conformément à l'accord concernant les candidats des provinces que la province en cause a conclu avec le ministre;
(b) they intend to reside in the province that has nominated them.	**b)** il cherche à s'établir dans la province qui a délivré le certificat de désignation.

[Emphasis added.] [Je souligne.]

[9] I underline paragraph 87(2)(*b*) of the *IRPR* above as it is the provision that underlies the refusal of Ms. Do's application for permanent residence and those of her family.

[10] Ms. Do also applied for a temporary work permit in August 2019. This was refused in September 2019. That decision is not in the record on this application, but the refusal is said to have been for insufficient documentation.

(2) Review and refusal of the application

[11] In June 2020, a visa officer in Singapore reviewed the permanent residence application. The visa officer's notes, recorded in the Global Case Management System (GCMS), indicate they were concerned that "it makes little sense for the applicant to leave an executive level position in Vietnam to take a job at this level with a company" that had had to use crowdfunding to finance its product. The visa officer thought it appeared "likely that this application is to facilitate permanent residence for the applicant's children and it appears unlikely that the applicant will take up employment and reside in Nova Scotia."

[12] By letter dated September 22, 2020, Ms. Do was advised that a personal interview was required to complete assessment of her application. The letter attached a list of documents to bring to the interview, including civil documents, police certificates, educational and training certificates and diplomas, information regarding assets, and passports. For applicants in the provincial nominee class, the letter also required information regarding employment, company

literature, and an updated job offer letter. Ms. Do obtained a confirmation letter from Pleiades that the offer remained open.

[13] The interview was conducted as scheduled in October 2020, by a visa officer at the Canadian Consulate General in Ho Chi Minh City. By this time, Ms. Do had left Thanh Thanh Cong and was working as a Finance Director at PwC.

[14] The interviewing officer entered detailed notes into the GCMS. Pertinent aspects of the interview are discussed below. Following the interview, the interviewing officer entered a further note stating that they were not satisfied with Ms. Do's response to their concern about why she would accept a risky and less well paid job in a smaller city in Canada:

> Applicant emphasized on her intention to compromise her plan for the children and the family to be in Canada; however, I am not satisfied that the dependent spouse and child have demonstrated the intention to reside in Canada or in the nominating province in Nova Scotia. Therefore, in totality, I am not satisfied the applicant will establish herself by taking the job offer in Nova Scotia and to reside in the nominating province. Eligibility failed.

[15] In November 2020, the visa officer in Singapore advised Nova Scotia by email of the potential refusal of a visa to their nominee. After an exchange in which Nova Scotia inquired whether Ms. Do had applied for a work permit, Nova Scotia advised IRCC in January 2021 that it maintained its nomination.

[16] On May 26, 2021, the visa officer in Singapore refused the application for permanent residence because they were not satisfied Ms. Do genuinely intended to take up the job offered to her in Nova Scotia. The GCMS contains the visa officer's notes of May 26, 2021, which form

part of the visa officer's reasons for decision. I note, however, that earlier GCMS notes, including the reasoning of the interviewing officer, and communications between the visa officer and Nova Scotia that summarize the interviewing officer's concerns, cannot necessarily be attributed to the visa officer who made the decision although they form part of the context for the decision. This is particularly so since the visa officer expressly set out the basis for their decision on the date the decision was made.

[17] The visa officer's notes of May 26, 2021 identify the following concerns:

- Ms. Do's high level of establishment in Vietnam did not appear consistent with someone who would take a financial analyst position with a modest company at a lower level than her prior positions, including her former position with JP Morgan Chase and her current position with PwC;

- Ms. Do did not reapply or challenge the refusal of her work permit, behaviour found inconsistent with a genuine intent to take up the offered job, while Ms. Do's explanation for this was found vague and did not overcome the concern;

- none of the family had travelled to Nova Scotia or Canada;

- Mr. Nguyen did not know where Ms. Do intended to live in Canada, something they could be expected to have discussed if she genuinely intended to reside in Nova Scotia, while their daughter did not name Nova Scotia as their destination and professed a desire to live in Toronto; and

- the family had no declared plans to purchase property in Canada.

(3) The decision is unreasonable

[18] In my view, the visa officer's decision fails to show the hallmarks of justification, transparency, and intelligibility required of a reasonable decision: *Vavilov* at paras 81, 86, 99. I reach this conclusion because several of the primary grounds for the decision fail to show a reasoned consideration of the evidence or a rational connection between that evidence and the conclusion.

[19] The primary concern of the visa officer appears to have been the nature of the position offered to Ms. Do, as compared to the executive positions she held in Vietnam. As set out in the interview notes, Ms. Do's explanation for her willingness to accept a lower paying job was clear: "We would like children to have chance to study in Cda. It's my family and career combined. I took the trade off between family and career." [Emphasis added.] This explanation was consistent with Ms. Do's evidence that she had found the job in 2018 after thinking about plans for her children. Such "trade offs" between personal career opportunities in the country of origin and the interests of family, and particularly children, in Canada are woven into the fabric of Canadian immigration.

[20] The visa officer referred several times in their GCMS notes to Ms. Do's prior positions, noting that her "high level of establishment in Vietnam does not appear consistent with someone who would take a financial analyst position". However, they did not engage with Ms. Do's explanation that she was willing to work in a financial analyst position as part of a trade off between family and career, or set out why they did not accept that this explanation was genuine.

While the Minister is correct that a visa officer need not accept an applicant's statements or explanations, a failure to consider or address those explanations on a matter of central importance is a sign of an unreasonable decision, even recognizing the attenuated requirement to give reasons on a visa determination: *Vavilov* at paras 125–128; *Patel v Canada (Citizenship and Immigration)*, 2020 FC 77 at paras 15–17.

[21] In their November 2020 email to Nova Scotia, the visa officer summarized the interviewing officer's concerns arising from the interview. This summary does refer to Ms. Do's explanation:

> Applicant emphasized on her intention to compromise her plan for the children and the family to be in Nova Scotia, Canada; however, the accompanying daughter expressed a desire to reside in Toronto, while the spouse declared he would live where his wife and daughter would live. He did not know where in Canada his spouse intended to reside.

[22] I cannot accept this as a demonstrating that the visa officer reasonably considered and addressed Ms. Do's evidence, for two reasons. First, as set out above, it does no more than summarize the interviewing officer's concerns in an email to Nova Scotia, rather than setting out the visa officer's own reasoning.

[23] Second, even if the reasoning could be attributed to the visa officer, it misstates Ms. Do's explanation and then purports to respond to it by mischaracterizing the evidence. Ms. Do did not state that she intended to compromise her plan for "the children and the family to be in Nova Scotia," but rather for her children to study in Canada. The evidence of the daughter, who was interviewed days before her 24th birthday, was not inconsistent with this intention. In any case,

the daughter's evidence, as recorded in the GCMS notes, was not simply that she desired to reside in Toronto but that she would probably live with her parents for the first few months and then probably wanted to live in Toronto. As the applicants note, the daughter was not asked where her parents intended to live. It is difficult to see how these wishes of an adult daughter could reasonably reflect adversely on the genuineness of Ms. Do's intention to take the position she was offered in Halifax.

[24] Given the importance of this issue to the visa officer's conclusion, their failure to reasonably engage with Ms. Do's explanation for why she was prepared to accept the "trade off" undermines the reasonableness of the decision.

[25] This failure is exacerbated by the lack of any analysis by the visa officer of Ms. Do's evidence of her intent to reside in Nova Scotia and work for Pleiades, including her knowledge of the company and their plans, her anticipated role with the company, and her plans for the future with the company.

[26] The visa officer's treatment of the work permit refusal also lacks transparency. The visa officer found that Ms. Do's not having re-applied for a work permit or challenged its refusal in September 2019 was inconsistent with someone who genuinely intended to take up the position, and that her "response to this concern" was "vague" and did not overcome the concern. I agree with the applicants that the GCMS notes do not show that this was expressed as a "concern" in the interview to which Ms. Do was asked to respond. Rather, the interviewing officer asked Ms. Do why Pleiades was willing to keep the position open for her for

two years. She referred to the value of her experience to the company, her discussion with the company about the lengthy permanent residence process, and the refusal of the work permit. The interviewing officer asked if she knew why she was refused. She responded that she had not provided enough information to support the application and then stated, apparently without any further question from the interviewing officer, that "[i]n end of 2019 my dad became ill so I talked to employer I needed few more months then covid hit." Ms. Do thus does not appear to have been asked to respond to any "concern" about not having re-applied for a work permit or challenged the refusal.

[27] In any event, the visa officer appears to be referring to Ms. Do's statement about her father's illness and the subsequent Covid-19 pandemic in referring to her "response to this concern." I am unable from the simple use of the word "vague" to understand why the visa officer considered that applying for a work permit, then not subsequently re-applying because of a parent's illness and the subsequent pandemic, was inconsistent with a genuine intention to accept a position to work in Halifax when permitted to do so.

[28] In my view, these shortcomings in the visa officer's analysis go beyond mere superficial or peripheral missteps: *Vavilov* at para 100. Rather they go to the heart of the visa officer's stated reasons for not being satisfied Ms. Do genuinely intended to reside in Nova Scotia. I conclude these shortcomings in the justification, transparency, and intelligibility of the decision are sufficient to render it unreasonable and require it to be set aside.

B. *The Process Leading to the Decision was not Fair*

[29] This Court has confirmed that the duty of procedural fairness owed to visa applicants, including applicants for permanent resident visas, is at the "lower end of the spectrum": *Bui v Canada (Citizenship and Immigration)*, 2019 FC 440 at para 26; *Patel* at para 10. However, even at the lower end of the spectrum, fairness dictates that an applicant be advised of concerns regarding their credibility and given an opportunity to respond to those concerns: *Patel* at para 10, citing *Hassani v Canada (Citizenship and Immigration)*, 2006 FC 1283 at para 24.

[30] The applicants argue the visa officer's decision made a material adverse finding regarding Ms. Do's credibility, and that she was not advised of any concern about her credibility so she could address it. The Minister argues the visa officer may have been concerned with the sufficiency of Ms. Do's evidence but did not question her credibility and that, in any case, the interview provided Ms. Do with an opportunity to address the concerns, including in particular the concerns about the financial analyst job being lower and lower-paying than her previous positions.

[31] I conclude that the visa officer's decision amounts to an adverse credibility finding, and that Ms. Do was not adequately advised of the credibility concerns either before or during her interview to satisfy the requirements of procedural fairness.

[32] As set out above, the visa officer's central finding was that they were not satisfied Ms. Do "genuinely intended" to reside in Nova Scotia. This finding was stated as being in contradiction to Ms. Do's statements:

> While I note the applicant has declared her intent to reside in Nova Scotia, for the following reasons, I am not satisfied that she genuinely intends to do so: […]
>
> [Emphasis added.]

[33] On my reading, this reasoning expressly indicates that Ms. Do's declared intention was not believed. This is confirmed by other aspects of the visa officer's reasoning, outlined above. This reasoning is directed not to a lack of evidence, but to assertions that elements of the evidence, including Ms. Do's own behaviour, were inconsistent with her actually taking the offered position and residing in Nova Scotia. Justice Diner in *Patel* concluded that concerns with the "genuineness" of a visa application were credibility matters that required an opportunity to respond: *Patel* at paras 10–12, citing *Al Aridi v Canada (Citizenship and Immigration)*, 2019 FC 381 at para 29. I similarly conclude that the visa officer's central concern was with the credibility of Ms. Do's declared intention to reside in Nova Scotia and work with Pleiades.

[34] This being so, the duty of procedural fairness required that she be "informed of and provided an opportunity to respond to perceived material inconsistencies, credibility concerns, accuracy or authenticity concerns": *Bui* at para 27. Despite the fact that an interview was conducted, I conclude that Ms. Do was not afforded this opportunity.

[35] The interview convocation letter sent to Ms. Do was general in nature. It said the interview was "required in order to complete the assessment of your application." It referred to a

general list of required documents. It referred to the onus on Ms. Do to satisfy the interviewing officer that she met the eligibility requirements. However, it did not refer to any concerns with Ms. Do's credibility or, in particular, any concern with the genuineness of her stated intention to reside in Nova Scotia.

[36] At the outset of the interview, the interviewing officer similarly stated that the purpose of the interview was to determine whether Ms. Do met the requirements of the *IRPA*. Questions were posed regarding Ms. Do's former positions in the financial industry and the nature of Pleiades as a company and the financial analyst position in particular. However, again, no indication was given that Ms. Do's credibility, or the genuineness of her intention to reside in Nova Scotia, was in issue. This is particularly striking, as this appears to have been the basis for the interview being convened. In a GCMS note from June 2020 that apparently led to the interview, the visa officer noted "[i]t appears likely that this application is to facilitate permanent residence for the applicant's children and it appears unlikely that the applicant will take up employment and reside in Nova Scotia" [emphasis added].

[37] The applicants cite Justice Manson's decision in *Yaman*, which bears a number of similarities to the current case: *Yaman v Canada (Citizenship and Immigration*), 2021 FC 584. There, as here, the visa officer had identified specific concerns about Mr. Yaman's intention to reside in the relevant province: *Yaman* at para 23. IRCC had sent Mr. Yaman an interview convocation letter similar to that sent to Ms. Do, but did not advise him of the concerns about his intention to reside in the province until late in the interview process: *Yaman* at paras 23–24. Justice Manson concluded that an applicant is "entitled to notice of an officer's concerns in

advance of an interview or an opportunity to respond to any concerns after the interview" and that in the absence of such notice, the process was unfair: *Yaman* at paras 26–27.

[38] The Minister points to Justice Ahmed's decision in *Tran* for the proposition that notice of credibility concerns need not be provided prior to an interview: *Tran* at para 53. I believe this is consistent with *Yaman,* which recognized that fairness may be met either by providing notice of a credibility concern in advance of a hearing *or* by providing sufficient notice at the hearing and an adequate opportunity to respond during or, as necessary, after the interview: *Yaman* at para 26; *Tran* at para 53. In *Tran*, Justice Ahmed found that the statements and questions posed at the interview, which clearly identified the credibility concerns and invited the applicant to respond, satisfied the duty of fairness: *Tran* at paras 57–58.

[39] In the present case, I conclude Ms. Do was not given adequate notice of the credibility concerns that were central to the visa officer's decision, either in advance of the interview or at the interview. Despite the visa officer having previously identified concerns about Ms. Do's intention to live in Nova Scotia, the closest the interviewing officer came to informing Ms. Do of those concerns was with the question "I have concerns specifically because you have had prominent executive roles in [Vietnam] with international corp[orations] but now want to work for a small and risky company, it makes little sense to me?" In my view, this is insufficient to give Ms. Do adequate notice of the concerns about her credibility and the genuineness of her intention to reside in Nova Scotia and is insufficient to meet the requirements of procedural fairness. As Justice LeBlanc noted in *Bui,* "an applicant should not be 'kept in the dark' about the information upon which an officer may render a decision": *Bui* at para 29, citing *Chawla v*

Canada (Citizenship and Immigration), 2014 FC 434 at para 19. The interview notes indicate that Ms. Do was kept in the dark regarding the ultimate concern that she did not genuinely intend to reside in Nova Scotia.

[40] I therefore conclude that the process leading to the decision was unfair.

IV. Conclusion

[41] The application for judicial review is therefore allowed. The visa officer's decision dated May 26, 2021 refusing the applicants' application for permanent residence is set aside and their application is remitted for redetermination by a different officer.

[42] Neither party proposed a question for certification and I agree that none arises in the matter.

[43] In closing, I wish to thank counsel for their able submissions and their thoughtful responses to the Court's questions during the hearing of the matter.

JUDGMENT IN IMM-4002-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The decision dated May 26, 2021 refusing the applicants' application for permanent residence is set aside and remitted for redetermination by a different officer.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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