Federal Court Cour fédérale

Date: 20230105

Docket: IMM-4732-21

Citation: 2023 FC 19

Toronto, Ontario, January 5, 2023

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

NEDA ZAMANI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of an officer [Officer] of Immigration, Refugees and Citizenship Canada, dated June 16, 2021 [Decision], refusing the Applicant's application for a permanent resident visa as a member of the Canadian Experience Class [CEC]. The Officer was not satisfied that the Applicant was an employee and met the requirements under section 87.1 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

[2] For the reasons set out below, it is my view that the application should be allowed. While I do not consider there to have been any breach of procedural fairness, the Officer did not account for all of the critical contradictory evidence before him, and thereby provided insufficient justification and transparency for the conclusion reached.

I. Background

[3] The Applicant, Neda Zamani, is a citizen of Iran who currently resides in West Vancouver with her spouse and child.

[4] In August 2007, she began full-time employment in Iran as a managing director for Avid Sobh Parsian [ASP], an international stone supplier. In 2017, ASP decided to expand business into North America and selected the Applicant to relocate to Canada. The Applicant came to Canada as a visitor on September 25, 2017.

[5] In October 2017, ASP established a subsidiary, Artin Stone Trading Co. [Artin], in British Columbia and appointed the Applicant and her husband as the company's shareholders. In 2018, the Applicant was granted an Intra-Company Transferee [ICT] work permit to initiate the start-up of the company. A further ICT was also obtained, extending the Applicant's work permit to 2022.

[6] In May 2020, the Applicant applied for permanent residence under the CEC, relying on her work experience at Artin.

[7] On January 20, 2021, the Officer sent the Applicant a Procedural Fairness Letter [PFL] regarding concerns that the Applicant's experience with Artin was self-employment, which would render her ineligible for permanent residence under the CEC. In response to the PFL, the Applicant provided the Officer with a letter explaining how she became employed at Artin and her role with the company; she also included corporate, financial, and tax documents.

[8] On June 16, 2021, the Officer refused the application. The Officer was not satisfied the Applicant was in an employer-employee relationship with Artin. Rather, he viewed the employment with the company as being self-employment, which under paragraph 87.1(3)(b) of the IRPR is not an accepted form of work experience for permanent residence under the CEC. The Decision included the following reasons:

> A comparative tax summary has indicated that you received self-employment income in 2018 and your spouse received it in 2019. In addition, you provided information to indicate that you do not report to anyone in Canada and neither does your spouse. But rather, you both only report to the mother company in Iran. I also note that in JUN2019 and MAR2020 respectively you and your spouse wrote each other's letters of employment which is not typical of an employer-employee relationship. Based on these letters I note that part of your job duties include "leading the company and ensuring all employees buy into the company vision as well as "setting the overall strategic direction of the company alongside the board" and your spouse's job duties include "supervising and leading the company operations and employees as well as "making sure that the company has sufficient resource such as capital, material and equipment. Based on this information, I find it reasonable to conclude that you both have a significant degree of control over the company's success in the finances and operations. Furthermore, I have noted that the company does not appear to have an outside office or location, as the addresses listed on all company documents provided is your residential address in Canada...
>
> Upon review of the application and all submissions as a whole, I am not satisfied on a balance of probabilities that you are in an employer-employee relationship at ARTIN STONE TRADING

> Co. Instead based on the submissions provided I find that your employment with this company is self-employment. In determining whether an applicant under the Canadian Experience Class (CEC) was an employee or self-employed during any period of qualifying work experience claimed in their application, I considered various factors, one in particular is having shares in the company. Individuals who hold substantial ownership and/or exercise management control of a business for which they are also employed are generally considered to be self-employed. In this instance Section C of the business plan provided indicates a 25% ownership for yourself and 75% ownership for your spouse, which exerts a great deal of control.

II. Issues and Standard of Review

[9] The Applicant raises the following issues:

A. Was there a breach of procedural fairness because:

i. the PFL was not sufficiently specific; and

ii. the Applicant was not provided an opportunity to respond to credibility concerns that arose from the Applicant's response to the PFL?

B. Did the Officer ignore or misapprehend material evidence rendering the Decision unreasonable?

[10] The standard of review for the substance of the Decision is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 9-10. Where the Court reviews an administrative decision for reasonableness, its role is to examine the reasons given by the decision-maker and determine whether the decision "is based on an internally coherent and rational chain of analysis" that is "justified in relation to the facts and law that constrain the decision-maker": *Vavilov* at paras 85-86; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31. A decision is reasonable if, when read as a whole and taking into account the administrative setting, it bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 85, 91-95, 99-100.

[11] Questions of procedural fairness ask whether the procedure was fair having regard to all of the circumstances with the ultimate question being whether the applicant knew the case it had to meet and had a full and fair chance to respond: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54, 56.

III. Analysis

A. *Was there a breach of procedural fairness?*

(1) Was the PFL sufficiently specific?

[12] A PFL must state the decision-maker's concerns with sufficient clarity and particularity to allow the affected party a meaningful opportunity to respond: *Asanova v Canada (Citizenship and Immigration)*, 2020 FC 1173 at paras 31-32; *Punia v Canada (Citizenship and Immigration)*, 2017 FC 184 at para 62.

[13] In this case, the relevant portion of the PFL stated:

> Based on the documentation you provided it appears that the work you performed between 2018 and 2020 was self-employment and therefore cannot be included in the calculation of your work experience.
>
> Without this time included in the calculation the total amount of qualifying work experience you have accumulated is less than one year or less than 1560 hours which is required.
>
> Before a final decision is made, you may submit additional information relating to the issue in question. Please include in your submissions the following documents for this qualifying period 2017-2020:
>
> - Corporate Registry Search and relevant documents (Artin Stone Trading Company Ltd.)
> - Statement of business earnings — T2125
> - T1
> - T4
> - Notice of Tax Assessment

[14] The Applicant argues that the PFL identified only general concerns with the application without identifying the specific aspects of the application that caused concern with respect to the Applicant's employment status. The Respondent argues that the Officer was not required to provide a more detailed explanation of his concerns, particularly as the concern related to the establishment of the base criteria under section 87.1 of the IRPR: *Adewunmi v Canada (Citizenship and Immigration)*, 2021 FC 1186 at para 26.

[15] It is clear that the Applicant understood the Officer's primary concern was with the nature of her employment as she responded by submitting additional documents in an attempt to show that she was not self-employed between 2018 and 2020. The Applicant has not identified any additional materials she would have submitted had she been given further detail in the PFL.

[16] While the Applicant argues that it was only after she received a response to her request under Rule 9 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 that she learned the Officer had concerns with the employment letters she and her spouse wrote. However, I agree with the Respondent that it was clear from the PFL that the Officer had concerns with the sufficiency of the documentation submitted, which included these reference letters. In my view, there is no basis to suggest that the Applicant has been prejudiced by the level of detail provided in the PFL.

(2) Was the Applicant provided an opportunity to respond to credibility concerns arising from the Applicant's response to the PFL?

[17] The Applicant contends that the Decision reveals that the Officer developed credibility concerns associated with the material submitted in response to the PFL and did not give the Applicant the opportunity to respond to these concerns.

[18] However, I agree with the Respondent, the Officer was not concerned with the credibility or accuracy of the evidence provided by the Applicant. Rather, the evidence simply did not assuage the Officer's concern that the Applicant's employment was self-employment.

[19] The Applicant is conflating credibility concerns with the Officer weighing the evidence and reaching conclusions contrary to the Applicant's position. Credibility and probative value are distinct concepts. Credibility refers to the believability of evidence, while probative value is a measure of the capacity of the evidence to establish the fact for which it is offered as proof: *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at paras 16-17, 21.

[20] The Officer assessed the contents of the information provided by the Applicant, but concluded that the Applicant had failed to establish that she was not self-employed.

[21] The Applicant was given a fair opportunity to provide further information to establish that her employment was not self-employment. The fact that the information provided was determined to be insufficient to establish this does not amount to a breach of procedural fairness.

B. *Did the Officer ignore or misapprehend material evidence rendering the Decision unreasonable?*

[22] The Applicant argues that the Officer erred in finding the Applicant was self-employed despite her being previously issued two ICTs based on similar information. She asserts that the Officer failed to consider the Applicant's T4 tax forms, along with the Dissolution and Subsidiary Agreement between ASP and Artin [Agreement], which demonstrated that ASP still had control over Artin. The Applicant highlights the Officer's error in stating that Artin does not have a distinct address from the Applicant's residential address.

[23] A decision-maker is generally presumed to have considered all of the evidence and need not mention every piece of evidence in his reasons. However, the decision-maker's burden of explanation increases with the relevance of the evidence. When a decision-maker refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the decision-maker overlooked the contradictory evidence when making its finding of fact: *Cepeda-Gutierrez v Canada (Minister of Citizenship & Immigration)* (1998), 157 FTR 35 (Fed TD) at paras 15-17.

[24] I agree with the Applicant, the Officer's failure to demonstrate his consideration of the issued ICTs and the Agreement, coupled with the Officer's mischaracterization of the company address as being the same as the Applicant's address on all company documents leave doubt as to whether the Officer fully and fairly considered all of the key evidence before him.

[25] As noted by the Applicant, the foundation for an ICT is that there is a qualifying relationship between an employer and the foreign worker who is an employee of the Canadian branch of the company to which they are being transferred. As set out in the information published on the Immigration Canada website relating to ICT, "[t]he essential element in determining [the] relationship is the right of the employer to order and control the employee in the performance of their work." (International Mobility Program: Canadian interests – Significant benefit – Intra-company transferees – Qualifying relationship between the employer and the foreign worker [R205(a)] (exemption code C12))

[26] The ICTs were issued in respect of the same time-period as the application for permanent residency under the CEC. While the information submitted for the ICT was not before the Officer on this application, the fact that a qualifying employer-employee relationship between Artin and the Applicant was recognized for the purpose of the ICT during the same time-period as that for the application under the CEC, in my view, necessitated some substantive discussion of the ICT in the Decision.

[27] The Decision refers to the guideline that "individuals who hold substantial ownership and/or exercise management control of a business for which they are also employed are generally considered to be self-employed". The Officer placed great emphasis on the fact that the business plan indicated that the Applicant owned 25% of the shares of Artin, while her husband owned the other 75% of the shares. However, as noted by the Applicant, the Decision does not consider the impact of the Agreement, which also speaks to the degree to which the Applicant had control and ownership of Artin. The Agreement states that Artin is to be wholly controlled and owned

by ASP for 7 years, that ASP maintains the sole right to transfer the shares from Artin's independent shareholders to others, and that Artin will cease to exist as a separate entity from ASP in September, 2025.

[28] The Respondent refers to the decisions of this Court in *Lazar v Canada (Citizenship and Immigration)*, 2017 FC 16 [*Lazar*] and *Byrne v Canada (Citizenship and Immigration),* 2017 FC 640 [*Byrne*]. However, I agree with the Applicant, these decisions are distinguishable.

[29] In *Lazar*, the Court rejected an argument that an officer ignored contradictory evidence in concluding that the applicant was self-employed, relying on his ownership of 90% of the company and his role as President as determinative (at paras 12-15). In that case, the additional documentation included the applicant's T4s, an employment letter, and a response to an application form question relating to self-employment. There was no suggestion that there was additional evidence relating to the ownership and control of the company in issue. Similarly, in *Byrne*, further documentation submitted in support of the application did not contradict the finding that the Applicant was involved in self-employment but rather bolstered that conclusion. In that case, the applicant had sought an extension of his temporary work permit to engage in work as an "Owner/Operator" of the company in issue.

[30] While I agree that the Officer was not required to refer to all of the documentation submitted by the Applicant, in this case, the nature of the information contained in the Agreement speaks directly to the issue of ownership and overriding control of Artin. In my

view, it warranted some discussion and consideration in the Officer’s analysis; otherwise, the Court cannot infer that the Officer considered this information in reaching his conclusion.

[31] The Respondent concedes the Officer misstated the evidence relating to the address of Artin being the same as that of the Applicant on all of the company’s documents, thus undermining the Officer’s conclusion that “the company does not appear to have an outside office or location”. Given this concession, coupled with the omissions noted earlier, I am left questioning whether the Officer fully considered and accounted for all of the key evidence.

[32] While the Officer may have come to the same conclusion, the failure of the Officer to demonstrate his consideration of this key evidence, in my view, renders the Decision unreasonable as it provides insufficient transparency and justification for its outcome.

IV. Conclusion

[33] For these reasons, the application is allowed, and the Decision will be set aside and referred to another officer for redetermination.

[34] There was no question for certification proposed by the parties, and I agree none arises in this case.

JUDGMENT IN IMM-4732-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, the decision of the Officer is set aside, and the application for permanent residency under the Canadian Experience Class is remitted back to another officer for redetermination.

2. No question of general importance is certified.

"Angela Furlanetto"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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