Federal Court  Cour fédérale

Date: 20231116

Docket: IMM-3126-22

Citation: 2023 FC 1518

Ottawa, Ontario, November 16, 2023

PRESENT: Madam Justice Pallotta

BETWEEN:

MAHDI KARIM KOSHTEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant, Mr. Mahdi Karim Koshteh, is employed by an Iranian company that plans to expand operations into Canada. Mr. Koshteh applied for a temporary work permit under paragraph 205(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*], exemption code C12, to accept an intra-company transfer to work as the executive director for the company's start-up Canadian subsidiary.

[2] A visa officer (Officer) refused Mr. Koshteh's work permit application because, for reasons recorded in Global Case Management System (GCMS) notes, the Officer was not satisfied Mr. Koshteh met the criteria of *IRPR* paragraph 205(a), or that he would leave Canada at the end of his authorized stay as required by *IRPR* subsection 200(1). On this application for judicial review, Mr. Koshteh submits the Officer's decision was both procedurally unfair and unreasonable, and he asks the Court to set it aside. He seeks an order that would require the Officer to issue a work permit for a period of at least one year, or alternatively, an order that would return his application to a different officer for redetermination.

[3] The parties agree on the applicable standards of review. Allegations of procedural unfairness are reviewed on a standard that is akin to correctness: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54. The central question is whether the procedure was fair, having regard to all of the circumstances: *Ibid*. The merits of the Officer's decision are reviewed on the reasonableness standard. This is a deferential but robust form of review that considers whether the decision, including the reasoning process and the outcome, is transparent, intelligible, and justified: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 13, 99.

A. *Preliminary Issue*

[4] At the outset of the oral hearing, the Court heard the parties' submissions on whether there was a potential conflict of interest because Mr. Koshteh's counsel is a director of the Canadian subsidiary. Counsel represented that he holds no shares and does not have a financial or personal interest in the company. Counsel also stated he incorporated the Canadian subsidiary

as part of his retainer with Mr. Koshteh, and named himself as a resident Canadian director to meet a regulatory requirement. It was agreed that counsel would submit a letter following the hearing, indicating Mr. Koshteh's consent to counsel's representation in this matter despite any potential conflict because counsel serves as a director of the subsidiary. Counsel filed a letter from Mr. Koshteh on June 28, 2023.

B. *Procedural Fairness*

[5] Mr. Koshteh submits the Officer breached procedural fairness in several ways: (i) the GCMS notes containing the Officer's reasons were only provided after Mr. Koshteh commenced this application for judicial review; (ii) there was undue delay in processing the work permit application, breaching the right to priority processing under the Global Skills Strategy stream; (iii) Mr. Koshteh had a legitimate expectation he would be treated in the same manner as other work permit applicants in the same category, and that he would be given an opportunity to respond to concerns before the Officer made a decision; (iv) the Officer did not provide an evidentiary basis for the concern that Mr. Koshteh would not leave Canada; (v) the Officer's findings amount to a veiled credibility finding without first providing opportunity to address credibility concerns; and (vi) the Officer's cumulative errors demonstrate bias.

[6] Mr. Koshteh submits the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 [*Baker*] call for a high level of procedural fairness in his case, including because: he was expected to invest time and resources preparing a business plan and incorporating a business in Canada; the Officer's decision is final with no right

of appeal; and the decision has a significant negative effect, and may negatively impact future visa applications.

[7] I agree with the respondent that the level of procedural fairness owed in the context of work permit applications is at the lower end of the scale. This is supported by a number of decisions of this Court, including: *Wang v Canada (Citizenship and Immigration)*, 2021 FC 1002 at paras 34-35; *Maghami v Canada (Citizenship and Immigration)*, 2023 FC 542 at para 20; *Iqbal v Canada (Citizenship and Immigration)*, 2022 FC 727 at para 23; *Igbedion v Canada (Citizenship and Immigration)*, 2022 FC 275 at para 16; *Singh v Canada (Citizenship and Immigration)*, 2022 FC 266 at para 37. Work permit applications do not raise substantive rights since visa applicants do not have an unqualified right to enter Canada: *Sulce v Canada (Citizenship and Immigration)*, 2015 FC 1132 at para 10. The refusal is not in itself a severe consequence, as Mr. Koshteh can re-apply.

[8] Mr. Koshteh's multiple allegations of procedural unfairness are not supported by the record.

[9] I do not agree with Mr. Koshteh that the failure to provide GCMS notes with the decision letter was procedurally unfair. Mr. Koshteh's notice of application for leave and judicial review stated he had not received the Officer's reasons for decision, and Mr. Koshteh was only required to perfect his application and file an application record after receiving the GCMS notes. I also note that this Court has previously rejected the argument that a failure to provide GCMS notes with a decision letter constitutes a breach of procedural fairness: *Haghshenas v Canada*

(Citizenship and Immigration), 2023 FC 464 at para 25 [*Haghshenas*]; *Raja v Canada (Citizenship and Immigration)*, 2023 FC 719 at para 32 [*Raja*], citing *Veryamani v Canada (Citizenship and Immigration)*, 2010 FC 1268 at para 30.

[10] Mr. Koshteh states the principles in *Haghshenas* and *Raja* are distinguishable because those cases involved work permit applications under exemption code C11, whereas his work permit application was made under exemption code C12. I disagree that *Haghshenas* and *Raja* are distinguishable on that basis. In both decisions, the Court relied on recognized principles that are not specific to the exemption code at issue. Furthermore, Mr. Koshteh has not provided a compelling reason to distinguish *Haghshenas* and *Raja* based on the exemption code at issue.

[11] Mr. Koshteh has not established a breach of procedural fairness arising from the Officer's finding that they were not satisfied Mr. Koshteh would leave Canada at the end of his authorized stay. Mr. Koshteh seeks to enter Canada for the purpose of establishing a Canadian start-up subsidiary for an Iranian company. The Officer pointed to a number of concerns regarding the plans in this regard, including that Mr. Koshteh had not furnished realistic plans to staff and finance the Canadian operation. This was the basis for the concern that Mr. Koshteh would not leave Canada at the end of his authorized stay.

[12] There was no breach of procedural fairness due to a failure to provide notice of and an opportunity to respond to the Officer's concerns.

[13] First, Mr. Koshteh alleges he had a legitimate expectation he would be treated in the same manner as other work permit applicants in the same category. Mr. Koshteh submits he met the requirements for intra-company transferees posted on the Immigration, Refugees and Citizenship Canada (IRCC) website—which include being employed in an executive, senior managerial, or specialized knowledge capacity by a multi-national company, seeking entry to work for at temporary period of at least one year in a similar position for an enterprise in Canada with a qualifying relationship such as a parent, subsidiary, branch, or affiliate, and complying with all immigration requirements for temporary entry—and he should have been given an opportunity to respond to additional concerns.

[14] There is no merit to this argument. There is nothing in the record to demonstrate a regular practice with other work permit applications in the category or a representation about the procedure, and the doctrine of legitimate expectation does not create substantive rights or guarantee a specific result: *Baker* at para 26; see also *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 94-97. In Mr. Koshteh's case, the Officer's concerns outlined in the GCMS notes related to the requirements of subsection 200(1) and paragraph 205(a) of the *IRPR* and the guidelines published on the IRCC website, including guidelines for assessing start-up companies. An officer is not obliged to advise an applicant of their concerns when the basis for a refusal is insufficient evidence or the failure to meet regulatory criteria. It is up to an applicant to satisfy an officer that their work permit should issue, and the officer is under no duty to provide a running score, give advance notice of a negative decision, or engage in a dialogue with the applicant: *Haghshenas* at para 21.

[15] Second, Mr. Koshteh alleges the Officer relied on veiled credibility findings.

[16] There may be a duty to provide an opportunity to respond when issues of credibility are raised: *Haghshenas* at para 20. However, in Mr. Koshteh's case, the Officer did not make an explicit or a veiled credibility finding. The Officer considered the information in Mr. Koshteh's application and was not satisfied that his business proposal would provide a significant benefit to Canada. The Officer's concerns included the financial viability of the Canadian subsidiary, and what the Officer considered to be unrealistic plans to staff and finance the Canadian subsidiary. Mr. Koshteh asserts he provided sufficient evidence to demonstrate financial viability. The Officer reached a different conclusion after assessing the evidence. As discussed below, the Officer reasonably found Mr. Koshteh had not established that he met the eligibility criteria of the category or the requirements of paragraph 205(a) of the *IRPR*.

[17] Turning to the allegation of delay, Mr. Koshteh has not established a reasonable expectation that his application would be processed in two weeks. Like the applicant in *Raja*, Mr. Koshteh provides no evidence beyond the two-week processing time stated on the IRCC website to substantiate his allegation: *Raja* at para 36. I agree with the respondent that the two-week processing time noted on the government website is an average processing time for similar applications, and not a guarantee. The five weeks it took to process Mr. Koshteh's application did not constitute undue delay.

[18] Finally, there is no basis for Mr. Koshteh's bias allegation. Allegations of a reasonable apprehension of bias must not be raised lightly, and require concrete support: *Sharma v Canada*

(Citizenship and Immigration), 2020 FC 381 at para 28 [*Sharma*]. They cannot rest on suspicion, conjecture, insinuations, or impressions of an applicant or his counsel, and must be supported by material evidence demonstrating conduct that derogates from the standard: *Sharma* at para 27; *Haghshenas* at para 26. There is no such evidence in the record before me.

C. *Reasonableness*

[19] Mr. Koshteh argues the Officer's decision is unreasonable. He states the negative result was arbitrary in light of the evidence before the Officer, and the Officer fundamentally misapprehended or failed to account for the evidence. Mr. Koshteh raises issues with the Officer's assessment of the parent company's ability to financially support the subsidiary and the Officer's finding that they were not satisfied Mr. Koshteh would leave Canada at the end of his authorized stay. He argues there was nothing to suggest his purpose of visiting Canada differed from the stated purpose in his application or that he would stay in Canada illegally at the end of the authorized period, and his travel history to Turkey and Iraq supports a conclusion that he would leave Canada at the end of the authorized period. In the absence of evidence suggesting or implying a risk of not leaving Canada, and faced with evidence indicating the opposite, Mr. Koshteh states the Officer was required to justify their contrary conclusion: *Aghaalikhani v Canada (Citizenship and Immigration)*, 2019 FC 1080 at para 21 [*Aghaalikhani*].

[20] Mr. Koshteh has not established that the Officer's decision was unreasonable.

[21] Mr. Koshteh has not established the Officer fundamentally misapprehended or failed to account for the evidence before them in reaching findings on the subsidiary's financial viability,

and whether the proposed business would create or maintain a significant benefit to Canada. As the respondent correctly notes, the Officer outlined a number of concerns about the parent company's financial ability to establish a business in Canada while maintaining operations in Iran, including that the business plan estimate for the first year's operating expenses amounted to 89% of the total funds held between the foreign company and Mr. Koshteh. The Officer also noted concerns about the proof of funds submitted with the application, and whether those funds would be available. The concerns included that Mr. Koshteh had only provided statements from one of four bank accounts for the parent company (showing few debit transactions), and he did not provide transaction details about his own bank accounts, one of which had been opened recently. Payroll documents also showed an unexplained drop in the parent company's staff between 2020 and 2021. The Officer's concerns were based on the record, and the Officer's findings were open to them in light of the record.

[22] Mr. Koshteh states he was not required to prove he had sufficient personal funds to come to Canada. However, that was not the Officer's reason for addressing the evidence regarding personal funds. Mr. Koshteh relied on his personal funds to support the financial viability of the subsidiary. His calculation of the funds available to support the subsidiary's operations and pay employees in Canada included the funds in his personal accounts.

[23] Mr. Koshteh asserts the Officer's findings were unreasonable as they failed to account for the revenue the subsidiary would generate. However, the Officer's findings are entitled to deference, and Mr. Koshteh has not established that the Officer ignored material evidence about the revenue the subsidiary would generate. As noted above, the Officer pointed out that the first

year's operating expenses alone would consume almost 90% of the available funds. Also, as the respondent notes, Mr. Koshteh's business plan projected the Canadian subsidiary would operate at a loss in the first year of operation.

[24] I agree with the respondent that the Officer did not err in raising a concern about the unexplained drop in the parent company's staff. On this application for judicial review, Mr. Koshteh asserts that the decline in staff was attributable to the COVID-19 pandemic. Mr. Koshteh's work permit application did not explain the drop in staff or provide a reason why the drop was not indicative of the parent company's financial situation. I also agree with the respondent that the Officer raised reasonable concerns about the benefit to Canada based on proposed salaries for the subsidiary's employees, which were below the median wage for the respective positions and location, as well as the subsidiary's ability to attract a manufacturing manager to replace Mr. Koshteh with a proposed wage that would be far lower than the median.

[25] I am not persuaded of an error with the finding about leaving Canada. In my view, *Aghaalikhani* is distinguishable. In *Aghaalikhani*, which involved a study permit application, the officer had ignored evidence directly contradicting his conclusions and made a number of key factual findings without supporting evidence. The Officer did not do so in Mr. Koshteh's case. As noted above, Mr. Koshteh sought to enter Canada for the purpose of establishing a Canadian start-up subsidiary and the Officer was not satisfied that the business plan was realistic. Consequently, the Officer was not satisfied Mr. Koshteh would leave at the end of his authorized stay. The Officer's findings were reasonable and supported by the evidence.

[26] I am not satisfied of any error based on a refusal to mention Mr. Koshteh's travel history, and I note this Court has previously rejected a similar argument: *Haghshenas* at para 27. Mr. Koshteh was not seeking to enter Canada for travel purposes and his travel history was not the basis for any concern.

[27] In conclusion, Mr. Koshteh has not established that the decision was procedurally unfair or unreasonable.

[28] This application for judicial review is dismissed. Neither party proposed a serious question of general importance for certification, and no such question arises in this case.

JUDGMENT in IMM-3126-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. No question of general importance is certified.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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