Federal Court  Cour fédérale

Date: 20240527

Docket: IMM-5673-22

Citation: 2024 FC 798

Ottawa, Ontario, May 27, 2024

PRESENT: Mr. Justice Pentney

BETWEEN:

THI MONG KIEU NGUYEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Thi Mong Kieu Nguyen, seeks judicial review of the denial of her application for permanent residence as a member of the Prince Edward Island Provincial Nominee program ("PEI PNP"). She has significant business experience, and proposed to create a new business in PEI providing a variety of healthcare related products and services.

[2] The Officer refused her application because they were not satisfied that the Applicant intended to reside in PEI, as required by paragraph 87(2)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*]. The Officer relied on several factors in support of this conclusion, including questions about the viability of the Applicant's business plan and her responses to several questions during the interview relating to the immigration history of her husband's relatives who had come to Canada.

[3] The Applicant claims that the decision is unreasonable for three main reasons. She argues the Officer gave undue weight to some factors without considering the countervailing evidence she had provided; the decision does not refer to nor reflect the specific terms of the Canada-PEI Agreement that establishes the framework for the decision; and the reasons provided by the Officer are inadequate.

[4] For the reasons set out below, the application for judicial review will be granted. I find the decision to be unreasonable because the Officer's analysis falls short in its treatment of the legal framework and the factual matrix.

II. Background

[5] The Applicant is a citizen of Vietnam, living in Ho Chi Minh City. She has a degree in pharmaceuticals, and is an owner of Kien Duon Pharmacy Household Business, where she works as Head of Business. She is also Deputy Manager of Quality Assurance at OPC Pharmaceutical JSC.

[6] The Applicant's husband has a degree in mechanical engineering, and is Director and Chair of the Board of Kim Long Group Co. Ltd., a business specializing in the design, installation and operation of electrical, fire protection and fire-fighting equipment for civil and industrial products. The couple have two children, aged 11 and 15 at the time of the application. They own a home and two parcels of land in Ho Chi Minh City. They own substantial shares of two companies, and have significant personal wealth.

[7] On September 28, 2018, the Applicant submitted her application for immigration to Canada under the PEI PNP 100% Ownership Stream. She said she intended to move her family to PEI to open up a home healthcare store selling vitamins, supplements, assisted living products and home medical equipment. In the future, she planned to expand the business to include home healthcare services for seniors living at home. The Applicant submitted a detailed business plan outlining the nature of the business, the PEI marketplace (including demographic projections and a survey of competitors already established there), and financial projections for the first several years of operation.

[8] In June 2018, the Applicant conducted a week-long exploratory visit to PEI, followed by a visit in December 2018 for an interview with provincial immigration officials. On December 20, 2018, PEI's Office of Immigration approved the Applicant under the PEI PNP 100% Ownership Stream.

[9] Having obtained PEI's approval, the Applicant applied for permanent residence on behalf of herself and her family on July 2, 2019. On October 6, 2020, the Applicant attended an interview with an Officer, with the assistance of a translator. During the interview, the Officer

raised several concerns with the Applicant which addressed both the viability of her business plan and her intention to reside in PEI.

[10] In particular, the Officer indicated that the Applicant's proposed business would be a high-risk undertaking because there were strong competitors in an already-saturated market. In addition, the Officer questioned the Applicant about the fact that her husband's sister had previously obtained permanent residence in Canada through the Manitoba Provincial Nominee Program, but had moved to Toronto six months after her arrival. The Officer also raised questions about her husband's preparations and plans for the move to PEI.

[11] The Officer noted concerns with the Applicant's credibility, particularly surrounding her claim to lack knowledge about her sister-in-law's entry into Canada and subsequent move to Toronto.

[12] Following the interview, the Officer's notes indicate they were not satisfied that the Applicant intended to reside in PEI, as required by paragraph 87(2)(b) of the *Regulations*.

[13] On November 2, 2020, the Applicant's representative sent a letter to address the Officer's concerns regarding the Applicant's intention to reside in PEI, providing additional information including a certificate showing that she had incorporated a business in PEI, and that she had retained a law firm to assist her in setting up the business and in purchasing a home. The additional documentation also included the Applicant's explanation addressing the Officer's questions about whether Walmart would be a major competitor for her business, supported by a letter from Grant Thornton pointing out that the Applicant intended to offer services that were not provided by Walmart. Finally, the Applicant's agent indicated that in light of the concerns

raised about her intention to reside in PEI, she was prepared to move under a one-year work permit in order to allow her and her family to settle and start the business.

[14] As required under the Canada-PEI Immigration Agreement, the Officer sent a letter to PEI on November 12, 2020, advising the province of the potential refusal of the Applicant's application, setting out the basis for the Officer's concerns about her business plan and intention to reside in the province.

[15] On December 18, 2020, the province replied to this letter, indicating it continued to support the Applicant's application, and stating that it was prepared to discontinue the request under the PEI PNP 100% Ownership Stream, and instead it would support her being granted a one-year work permit to allow her to move to PEI and to establish the business, prior to being granted a permanent resident visa.

[16] The Officer considered the province's response, but ultimately concluded that it did not overcome the concerns with respect to the Applicant's intention to reside in PEI. Therefore, a refusal letter was issued to the Applicant, denying her application because she had not established her intention to reside in PEI, and thus did not meet the criteria set out in paragraph 87(2)(b) of the *Regulations*.

[17] The Applicant seeks judicial review of this decision.

III. Issues and Standard of Review

[18] The over-arching issue in this case is whether the refusal decision is reasonable. Within that, the Applicant raises several questions that are all subsumed within the reasonableness analysis.

[19] The standard of review that applies is the reasonableness framework as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, and recently confirmed in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 2.

[20] In summary, under the *Vavilov* framework, a reviewing court "is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 2 [*Canada Post*]). The reviewing court must look for any "fatal flaws" in the reasons' overarching logic (*Vavilov* at para 102).

IV. Analysis

A. *Legal Framework*

[21] Immigration is one of the few areas of shared jurisdiction in the *Constitution Act, 1867*. Section 95 recognizes the concurrent powers of the federal and provincial levels of government to legislate in this area. This is a reflection of the national interest in managing the flow of persons into the country while also acknowledging the reality that specific needs and approaches will be different in a land as vast and diverse as Canada. The Provincial Nominees Program and

the federal-provincial/territorial agreements that give effect to it, such as the Canada-PEI Agreement that applies here, are one expression of this shared interest.

[22] The Agreement sets out a number of steps that must be followed in giving effect to each jurisdiction's roles and responsibilities. An Applicant must first satisfy PEI that they meet the terms of their program, in this case the 100% Ownership stream. Once the individual has been nominated for selection by PEI, they must submit an application to Canada and demonstrate that they meet the legal requirements for approval for a visa to enter Canada. Some of the specific terms of the Agreement will be discussed in the analysis below.

[23] The legal principles that guide the analysis of refusals under PNP programs, and the Canada-PEI program in particular, have been discussed in several recent decisions, and it is not necessary to repeat that here. A short summary of the key aspects will be sufficient. The case-law confirms the following points:

- The specific wording of the Canada-PEI Agreement is different than that contained in other province's agreements. Under the Canada-PEI Agreement, a provincial nomination creates a strong presumption that the PEI government has conducted due diligence in assessing the individual's ability to become economically established: *Hassan v Canada (Citizenship and Immigration)*, 2019 FC 1096 at para 23 [*Hassan*];

- When a refusal takes issue with an applicant's intention to reside in PEI, subsection 87(2) of the *Regulations* provides the authority to refuse the application, but the analysis must not conflate residency with the analysis of an applicant's ability to become economically established: *Thuy v Canada (Citizenship and Immigration)*,

2021 FC 522 at para 41 [*Thuy*] and *Tran v Canada (Citizenship and Immigration)*, 2021 FC 1054 at paras 28-30 [*Tran*];

- As stated by Justice Alan Diner in *Thuy* at paragraph 42: “Intention is notoriously difficult to ascertain because of its inherently subjective nature. Assessment of intention may take into account “present circumstances, and future plans, as best as can be ascertained from the available evidence and context”’’ (*Dhaliwal v Canada*, 2016 FC 131 at para 31; *Rabbani v Canada (Citizenship and Immigration)*, 2020 FC 257 at para 43); *Tran* at paragraph 33.

B. *Issues*

[24] Applying the above guidance to the case at bar brings into sharp focus several key questions:

1. Did the Officer wrongly conflate the analysis of the viability of the business plan with the intention to reside in PEI?

2. Is the Officer’s analysis reasonable, given the legal and factual matrix, in particular the specific terms of the Canada-PEI Immigration Agreement?

3. Are the reasons sufficient to justify the refusal, in light of the record?

C. *Discussion*

(1) The Officer did not conflate economic establishment with intention to reside

[25] As noted above, an Officer must recognize that economic establishment and intention to reside are different factors, and it is unreasonable to base a decision on intention to reside solely on weaknesses in the business plan: *Thuy* at para 41.

[26] In this case, I am not persuaded that the Officer fell into this trap. A review of the Officer's notes from the interview with the Applicant as well as the correspondence with PEI is telling in this regard, because it shows that the Officer's concerns about the Applicant's intention to reside were not based solely on the alleged weaknesses in her business plan.

[27] The interview notes make it clear that the Officer explored two main areas of concern. First, many questions related to the viability of the Applicant's business plan, which the Officer summarized as follows: "high risk business with very strong competitor in a small saturated market." Second, the Officer asked several questions about the reasons why the Applicant wanted to settle in PEI, given that her husband's sister and the sister's family live in Toronto. The sister's immigration path added to the Officer's concerns, because she and her family had first come to Canada by investing in Manitoba but subsequently moved to Toronto. The Officer found some of the Applicant's answers about her husband's family in Toronto gave rise to credibility concerns.

[28] In a similar vein, the Officer's letter to a PEI official providing the notice of possible refusal under the terms of the Canada-PEI Agreement stated the following:

> The applicant was unable to satisfy the interviewing officer that she intended to start up the business in PEI because it appeared to be a high risk business in a saturated market. As the applicant was unable to satisfactorily demonstrate that she intended to open the business in PEI, the officer was not satisfied that the applicant intends to reside in PEI. The officer was further concerned that the applicant's sister had immigrated to Manitoba under the provincial nominee program as an entrepreneur and within 6 months had taken up residence in Toronto. Additionally, the apparent plan for the spouse, who is employed as a chairman of the board in Vietnam, is to take care of the children, and maybe go to college to become an electrician.

[29] Once again, this sets out the line of reasoning and demonstrates that the concerns about the viability of the business plan were not the sole reason for doubting the Applicant's intention to settle in PEI. These same concerns about intention to reside in PEI were carried forward to the final notes that set out the basis for the decision.

[30] I am therefore not persuaded that the Officer wrongly conflated the two factors. In this respect, the decision in this case can be distinguished from *Thuy*, where the Officer's concerns about the visa applicant's intention to reside were based solely on the frailty of her business plan. The decision in this case is not unreasonable on this basis.

(2) The Officer's analysis of the legal and factual matrix is unreasonable

[31] Under the *Vavilov* framework, a reasonable decision must be justified in light of the legal and factual context: "Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers" (*Vavilov* at para 105).

[32] In this case, I find that the Officer's analysis falls short in its treatment of the legal framework and the factual matrix. Part of the problem with the decision relates to the fact that –

as pointed out by the Applicant during the hearing – the GCMS notes show that several different Officers were involved at various stages of the decision-making process. In particular, the Officer who made the final decision was not the one who conducted the interview with the Applicant. While this is not fatal, it does influence the extent to which the prior Officer's notes can be taken to form part of the final decision made by a different Officer. In my view, in such an instance the final decision-maker must make clear whether they are adopting or incorporating concerns expressed by prior Officers into their analysis, or they must make independent findings that cover all of the key aspects: see the discussion in *Do v Canada (Citizenship and Immigration)*, 2022 FC 927 at para 16.

[33] A key element of the legal matrix that acts as a constraint on the decision in this case is the Canada-PEI Agreement. The specific terms of this agreement have been discussed in prior decisions, and it is once again not necessary to repeat that here. The parties in this case debated whether a presumption of intention to reside arose from the Applicant's nomination by PEI.

[34] Prior cases have confirmed that PEI's nomination of an individual under the Agreement is strong *prima facie* proof of their capacity for economic establishment, and Officers have an obligation to explain why they are departing from that. They must also consult with PEI regarding their intention to refuse an application on this ground, and to consider the province's response: see *Hassan* at para 23 and *Thuy* at paras 44-45.

[35] In contrast, no such strong presumption is said to arise regarding intention to reside: see *Tran* at paras 31-32. In this case, the notice sent to PEI dealt with both aspects, and so nothing turns on this point.

[36] The Applicant submits, however, that the Officer's reasons fail to provide any justification for over-riding PEI's determination that the Applicant intended to reside in the province. She argues that the provincial nomination gives rise to a presumption that she satisfies both the economic establishment and intention to reside factors. While she acknowledges that Canada can make a final determination on the application, the Applicant contends that the reasons must demonstrate a reason for setting aside the province's assessment regarding intention to reside.

[37] In support of this argument, the Applicant points to the terms of the Agreement itself as well as the IRCC Operational Instructions to Officers. Annex A of the Agreement deals with provincial nominees. It describes the shared principles that Canada and PEI agree to uphold, including that PEI is "best positioned to… assess and nominate candidates that will meet [its] economic and labour market needs and have the ability and intention to economically establish and settle in [the province]" (Article 2.1.1) (emphasis added). The assessment process is described in article 4:

> 4.1. Prince Edward Island has the sole and non-transferable responsibility to assess and nominate candidates who, in Prince Edward Island's determination:
>
> 4.1.1. Will be of benefit to the economic development of Prince Edward Island; and
>
> 4.1.2. Have the ability and intention to economically establish and permanently settle in Prince Edward Island subject to sections 4.3 through 4.9.
>
> 4.2. Canada shall consider Prince Edward Island's nomination as evidence that Prince Edward Island has carried out its due diligence determining that an applicant will be of economic benefit to Prince Edward Island and has met the requirements of Prince Edward Island's Provincial Nominee Program.

[38] In view of the conclusion that I reach on the Officer's failure to analyze all of the Applicant's evidence on key points, it is not necessary to rule on whether there is a presumption to be overcome when an Officer disagrees with PEI's assessment of an individual's intention to reside in the province. Variations on this argument have been discussed in recent case-law: see *Tran v Canada (Citizenship and Immigration)*, 2021 FC 721 at paras 22-29; *Thuy*; *Tran* at paras 26-29; *Hassan* at paras 22-24.

[39] On this point, I note that it appears that IRCC interprets the provisions of the Agreement as giving rise to a presumption, as set out in its Operational Manual OP 7-B "Provincial Nominees". In Section 7.8, which deals with refusals of applications, the document sets out three bases on which a provincial nominee who meets all other admissibility requirements can be refused a visa. Only two of these grounds are relevant here: that the officer has reason to believe the applicant does not intend to reside in the province of nomination, or that the individual is unlikely to be able to successfully establish economically. The Manual then states: "In each case, the officer must have some evidence to support this belief and overcome the presumptions implied by the provincial nomination."

[40] At a minimum, the Officer was required to analyze the Applicant's application in accordance with the terms of the Canada-PEI Agreement. While the absence of any reference to the Agreement in the reasons is not fatal, a failure to follow its specific terms is unreasonable. Here, PEI had approved the Applicant under its program, and when advised of the possible refusal the province re-affirmed its support, and it proposed an alternative approach that would enable her to move to PEI to open her business, thereby demonstrating in a concrete manner her

intention to reside there. The Officer did not mention this in the analysis, and the Officer's reasons do not reflect the specific and strong language used in the Canada-PEI Agreement.

[41] It is unreasonable for the Officer to fail to grapple with the impact of PEI's nomination, and the confirmation of its support following the advisory letter. Under the terms of the Agreement, PEI had determined that the Applicant had the ability and intention to economically establish herself and to reside in the province. Canada was to consider the province's nomination as confirmation that PEI had conducted its due diligence regarding the Applicant's compliance with the provincial program, and part of that involved its assessment of her intention to reside. The Officer was required to explain their reasons for departing from the province's assessment. That obligation flows from the specific terms of the Agreement, which forms part of the legal matrix that bound the Officer.

[42] The Officer's failure to explain how they applied the Agreement is significant, and in my view it is sufficient to make the entire decision unreasonable when combined with the next issue, which is the failure to mention or analyze key evidence provided by the Applicant that directly contradicts several of the Officer's statements.

[43] As noted earlier, the Officer explored two key areas of concern in the interview and in the exchange with PEI: the viability of the business plan and the Applicant's intention to reside. The perceived weakness of the business plan was cited as tending to call into question the Applicant's intention to reside, in addition to the other factors discussed by the Officer. However, the Officer's discussion of the business plan reveals several gaps that are significant. First, the Officer questioned the Applicant about why anyone would pay for the products she intended to sell, asking her if she was aware that health care in Canada is free? It bears repeating

here that the Applicant had stated in very clear terms that she intended to sell mobility aids such as wheelchairs and walkers, daily living aids such as hearing aids and bed tables, and therapeutic aids such as crutches and canes. The Officer's statement that health care is free appears to disregard the reality that many of the products the Applicant intended to provide are not generally paid for by provincial health care plans.

[44] A greater problem relates to the Officer's analysis of the market competition for the Applicant's business. During the interview, the Officer note that the Applicant would be competing with established businesses including a large chain like Walmart. The Applicant indicated that her research showed that Walmart did not carry many of the products she intended to sell, and she was aware of the other competitors' price structure and sales models. She explained how she would successfully enter the market by differentiating her price and product lines, as well as by focusing on home delivery.

[45] Following the interview, the Applicant provided further information to the Officer to address the concerns that had been raised about her intention to reside in PEI as well as her business plans. This included a certificate of incorporation of her company in PEI, a letter showing she had retained a law firm and hired a realtor to search for a place to live, as well as a detailed letter from a consulting firm that supported her analysis of the competitive environment for the business and specifically addressed the Officer's questions about Walmart.

[46] All of the Applicant's supplementary evidence directly addresses concerns raised by the Officer during the interview, and in particular the consultant's letter addressed the viability of her business plan. While the Officer was not bound to accept this evidence, there is simply no mention of it in the GCMS notes beyond the boilerplate statement that the Applicant's

"responses to these concerns were considered in full." In the circumstances of this case, and especially in light of the specific and detailed nature of the responses that directly contradicted the Officer's stated concerns, this is simply not sufficient.

[47] In addition, the Applicant had provided a detailed and specific response to the Officer's concerns regarding her intention to reside. She had explained why she and her husband and son were drawn to PEI, their lack of a close relationship with the husband's sister, and her close friendship (and that of her son) with a family that had settled in PEI. Once again, the Officer was not bound to accept all of this, but there is no explanation for why it was discounted beyond concerns about the credibility of some of the Applicant's answers.

[48] The Officer was required to explain, at least to some degree, how and why the Applicant's evidence was found to fall short of the mark. This was not done. I find this to be a significant – and fatal – gap in the reasoning. It makes the entire decision unreasonable.

[49] In light of this, it is not necessary to address the other points that were raised by the parties. The decision is unreasonable and will be set aside.

[50] The matter will be remitted back for reconsideration by a different Officer. In light of the passage of time, the Applicant shall be provided an opportunity to submit updated information to the Officer before a decision is made.

[51] There is no question of general importance for certification.

JUDGMENT in IMM-5673-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The decision is quashed and set aside. The matter is remitted back for reconsideration by a different officer. The Applicant shall be provided the opportunity to provide updated information before a decision is taken, if she wishes to do so.

3. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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