Federal Court  Cour fédérale

Date: 20240703

Docket: IMM-5874-23

Citation: 2024 FC 1041

Toronto, Ontario, July 3, 2024

PRESENT: The Honourable Mr. Justice A. Grant

BETWEEN:

POOYA BADKOOBEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The Applicant sought permanent residence in the Self-Employed Persons Class, based on his intention to become a filmmaker and producer in Canada, and to start a Canadian production company. An immigration officer [the Officer] was not satisfied the Applicant had provided sufficient evidence that he had obtained the required two years of relevant experience within the assessment period. As a result, the Applicant's permanent residence application was rejected.

[2] I will grant this application for judicial review. I find that, in arriving at the above conclusion, the Officer violated principles of procedural fairness in relying on evidence that was extrinsic to the record, without disclosing this evidence to the Applicant and providing him a chance to respond.

II. BACKGROUND

A. *Facts*

[3] The Applicant is a citizen of Iran. In his application, he outlined a significant body of personal experience in film, television and advertising businesses in Iran. He also discussed his ownership stakes in various family-run businesses in these industries.

[4] The Applicant came to Canada in 2019 as a student in the York University MFA program. In 2020, he filed an application for permanent residence in the Self-Employed Persons Class with his wife and two daughters included as dependents. The family continue to reside in Canada.

[5] The Applicant provided numerous documents in support of the application: his CV; a business plan for his proposed film production company; incorporation articles of the above-noted family-run businesses; work contracts for various projects undertaken by those family-run businesses; photos of his awards; a summary of his assets, including audit reports for the family-run businesses; and his educational documents.

[6] In 2022, the Applicant submitted an update to his application, explaining that he had received a Labour Market Impact Assessment [LMIA]-exempt work permit as a self-employed entrepreneur. The work permit was granted on the basis of the Applicant's role as the Vice President/Chief Executive Developer of WeFX, a visual effects company that he co-founded in Canada. The Applicant provided a copy of his work permit and a description of WeFX, including samples of projects the company had worked on in the past.

III. DECISION UNDER REVIEW

[7] The Applicant's permanent residence application was refused on March 2023, as the Officer found that the Applicant had not satisfactorily demonstrated that he had the relevant experience within the last five years to become self-employed in Canada. The Officer found that although the Applicant stated he was self-employed as a filmmaker from January 2009 to the present, and had established WeFX in Canada, the application raised several concerns, including the following:

- All of the contracts provided in relation to the Applicant's companies were signed by his father on behalf of a family company;
- His documentation and social media profile indicated he had been working for Badkoobeh Creative Communication Solutions and other companies in various roles for 19 years; and
- A web search of WeFX did not demonstrate active operations in Canada.

[8] As a result of these concerns, the Officer was not satisfied that the Applicant met the definition of a "self-employed person" as set out in paragraph 88(1)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], and the application was refused on this basis.

IV. ISSUES

[9] The Applicant challenges both:

i) The fairness of the process that led to the refusal of his application; and

ii) The reasonableness of the Officer's decision.

V. RELEVANT PROVISIONS

[10] The following provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27, are applicable to this matter:

Application before entering Canada	**Visa et documents**
11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11 (1)** L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

[11] The following provisions of the *Immigration and Refugee Protection Regulations* are applicable to this matter:

Definitions	**Définitions**
88 (1) The definitions in this subsection apply in this Division.	**88 (1)** Les définitions qui suivent s'appliquent à la présente section.
[…]	[…]
relevant experience, in respect of	**expérience utile**
(a) a self-employed person, other than a self-employed person selected by a province, means a minimum of two years of experience, during the period beginning five years before the date of application for a permanent resident visa and ending on the day a determination is made in respect of the application, consisting of	**a)** S'agissant d'un travailleur autonome autre qu'un travailleur autonome sélectionné par une province, s'entend de l'expérience d'une durée d'au moins deux ans au cours de la période commençant cinq ans avant la date où la demande de visa de résident permanent est faite et prenant fin à la date où il est statué sur celle-ci, composée :
(i) in respect of cultural activities,	**(i)** relativement à des activités culturelles :
(A) two one-year periods of experience in self-employment in cultural activities,	**(A)** soit de deux périodes d'un an d'expérience dans un travail autonome relatif à des activités culturelles,
(B) two one-year periods of experience in participation at a world class level in cultural activities, or	**(B)** soit de deux périodes d'un an d'expérience dans la participation à des activités culturelles à l'échelle internationale,
(C) a combination of a one-year period of experience described in clause (A) and a one-year period of experience described in clause (B),	**(C)** soit d'un an d'expérience au titre de la division (A) et d'un an d'expérience au titre de la division (B),

[…]	[…]
self-employed person means a foreign national who has relevant experience and has the intention and ability to be self-employed in Canada and to make a significant contribution to specified economic activities in Canada. (*travailleur autonome*)	***travailleur autonome*** Étranger qui a l'expérience utile et qui a l'intention et est en mesure de créer son propre emploi au Canada et de contribuer de manière importante à des activités économiques déterminées au Canada. (*self-employed person*)

VI. STANDARD OF REVIEW

[12] The standard of review in respect of the reasons provided by the Officer for rejecting the Applicant's application is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[13] The standard of review in respect of the fairness of the process that led to the decision is akin to the correctness standard: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 34-35, 54-55.

VII. ANALYSIS

A. *Preliminary Issue – contents of Applicant's affidavit*

[14] As a preliminary matter, the Respondent argues that several paragraphs from the Applicant's affidavit contain "arguments, opinions, legal conclusions and extrinsic evidence that is irrelevant or rebuts the Officer's decision." As such, the Respondent requests that these

portions of the affidavit, and any arguments relying on them, be struck from the record, or given no weight.

[15] The applicant accepts that some of the information contained in his affidavit was not explicitly before the Officer, but argues that some of this evidence was merely meant to summarize the context of the Applicant's permanent residence application, while other aspects are meant to illustrate the Officer's breach of procedural fairness. On this point, the Applicant notes that evidence may be adduced on judicial review to establish a breach of procedural fairness in the underlying decision. This, the Applicant argues, was the purpose behind the new information he provided and, as such, it should be admitted as an exception to the general rule that evidence not before the original decision-maker is inadmissible on judicial review.

[16] Given my findings below, I need not make a determination on the Respondent's objection. I have found that, irrespective of the information contained in the Applicant's affidavit, the Officer in this matter violated principles of fairness in consulting external sources to impugn the Applicant's credibility, without first disclosing such sources to the Applicant and providing him with an opportunity to respond.

B. *The Officer's consideration of extrinsic evidence*

[17] This application for judicial review must be granted, as the Officer considered, and relied on, important evidence that was not in the record, without providing the Applicant an opportunity to respond.

[18] As noted above, in supplementing his initial application, the Applicant informed Immigration, Refugees and Citizenship Canada [IRCC] in 2022 that he had received in LMIA-exempt work permit, and that he was "currently running a successful business in Canada." The Applicant also provided a document outlining the work of WeFX, which indicated that the Applicant was a co-founder of the company and that they had a team of over 100 people. The inescapable assertion that the Applicant made in this submission was that he was currently running an active and successful business in Canada.

[19] However, in notes inputted into the Global Case Management System, which form a part of the reasons for decision, the Officer stated as follows:

> Web-search about the Canadian company and appears they are not actively operating it according to the comment.

[20] The Applicant argues that in arriving at the above statement, the Officer was functionally, if not explicitly, making an adverse credibility finding. Doing so without providing the Applicant with an opportunity to respond to the web-search concerns was, according to the Applicant, procedurally unfair.

[21] The Respondent argues that the Officer did not violate principles of fairness in conducting the web searches of WeFX because: i) the level of procedural fairness owed in these cases lies at the lower end of the spectrum; ii) the Applicant submitted information related to WeFX, and it was therefore open to the Officer to independently assess the Applicant's involvement with the company; and iii) the Officer did not make an adverse credibility finding, but simply found that the Applicant had failed to meet his onus with sufficient evidence.

[22] For the reasons that follow, I agree with the Applicant. In his updated submission to IRCC, the Applicant could not have been more explicit that he was the co-founder of WeFX and was currently running the business, which was active and successful. The Officer could have simply accepted this submission at face value. Conversely, the Officer could have explained why the Applicant's involvement in this company did not sufficiently assist him in meeting the definition of a self-employed person under the IRPR.

[23] What the Officer could not do, however, was engage in independent internet research, and then cast doubt on the credibility of the Applicant's submission that he was currently running a successful and active business in Canada, without giving him an opportunity to respond to the results of that research: *Mohitian v. Canada (Citizenship and Immigration)*, 2015 FC 1393 at paras 23-24; *Yazdanian v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 7710 (FC), [1999] FCJ No 411, 170 FTR 129 at para 18; *Belen v. Canada (Citizenship and Immigration)*, 2019 FC 1175; *Tafreshi v. Canada (Citizenship and Immigration)*, 2022 FC 1089 at paras 72-73.

[24] Parenthetically, I would add the following. The Officer need not have accepted that the Applicant met the Regulatory criteria based on the information submitted by the Applicant and I note, on this point, that the Applicant did not provide any financial statements or official documentation in relation to WeFX. The only document provided was what appears to be a slide presentation outlining the WeFX leadership team and key activities. What was not permissible, however, was to call into question the credibility of the Applicant's submission based on internet searches that were not disclosed to him and could not, therefore, be clarified or contested by him.

[25] As noted, I find that the Officer's decision was tainted by procedural fairness concerns. Beyond such concerns, the Officer's internet research also frustrates the process of substantive review, as it deprives the Court from assessing the reasonableness of the Officer's conclusions, drawn as they were from internet research that is not in the record. Perhaps the Officer's research legitimately called into question whether WeFX is an active Canadian company. Alternatively, it may be that the Officer was completely mistaken in the searches that were performed. Neither the Applicant nor this Court can know, and on this basis alone this application for judicial review must be granted.

[26] While the Applicant has raised other concerns with the Officer's decision, the above conclusions require this matter to be redetermined, and as such, I need not consider them here.

VIII. CONCLUSION

[27] For the above reasons, this application for judicial review will be granted.

[28] No question of general purpose for certification was proposed and I agree none exists.

JUDGMENT in IMM-5874-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is remitted to a new decision-maker for redetermination.

3. No question is certified for appeal.

"Angus G. Grant"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5874-23
STYLE OF CAUSE:	POOYA BADKOOBEH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 3, 2024
REASONS FOR JUDGMENT AND JUDGMENT:	GRANT J.
DATED:	JULY 3, 2024

APPEARANCES:

Alexandra Goncharova	FOR THE APPLICANT
Diane Gyimah	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bellissimo Law Group PC Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT