Federal Court Cour fédérale

Date: 20100824

Docket: IMM-5339-09

Citation: 2010 FC 838

Ottawa, Ontario, August 24, 2010

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

Qun Huan PAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Qun Huan Pan, is a citizen and resident of China. In July 2005, she applied for permanent residence in Canada under the provisions applicable to the investor class.

[2] In August 2009, her application was rejected. Ms. Pan seeks to have that decision set aside and remitted to another visa officer for re-determination on the grounds that the visa officer who made that decision erred by:

(i) failing to make his decision in accordance with the principles of procedural fairness; and

(ii) basing his decision on erroneous findings of fact made in a perverse or capricious manner and without regard to the material before him.

[3] For the reasons that follow, this application is dismissed.

I. <u>Background</u>

[4] According to the information provided by Ms. Pan, she has worked in the auto parts industry since 1984. From July 1993 to December 2001, she worked as a senior manager with a vehicle fittings company. In 2002 she opened her own business.

[5] In support of her application, she submitted a significant amount of documentation to establish, among other things, that she had a legally obtained net worth of at least $800,000 and had business experience, as required by subsection 88(1) of the *Immigration and Refugee Protection Regulations*, SOR 2002-227 ("*Regulations*").

[6] In June 2007, an initial screening officer identified "a few discrepancies" in the information provided by Ms. Pan and recommended that she be requested to attend an interview. Among other things, those discrepancies included the following:

(i) she apparently only invested $60,000 in her new business, even though she claimed to have earned significant amounts of money prior to starting that business;

(ii) the audited financial information she provided appeared to be self-serving (because there was no requirement for "individually-owned" companies to prepare audited financial statements) and was prepared by someone who was believed to have worked with immigration consultants to provide backdated consolidated financial reports for other immigration applicants; and

(iii) the registered capital of her company appeared to be too low to manage a business with the reported level of annual gross revenues.

[7] In June 2009, she was sent a letter requesting her to provide updated information and to attend an interview. Among other things, the information that was requested at that time included an Updated Personal Net Worth Statement with supporting documentation and an Updated Statement detailing the accumulation of her funds.

[8] During Ms. Pan’s interview at the Canadian Consulate General in Hong Kong in August 2009, visa officer Tyler Arrell (the “Visa Officer”) focused his questions on (i) the activities of her business, in particular the products sold by that business; and (ii) how she was able to generate sales of RMB$2.4 million in 2002, given that she reported an investment of only RMB$60,000 in that business. After repeated questioning on the latter matter, Ms. Pan disclosed that she contributed a further amount of “about RMB$200,000” to the business.

[9] Towards the end of that interview, the Visa Officer expressed his concerns that Ms. Pan may not have the business experience or sufficient legally obtained net worth required to become a permanent resident as a member of the investor class. With respect to business experience, he noted that she was unable to describe the details of her business. Regarding her net worth, he noted that the information she had provided did not demonstrate or substantiate how she was able to obtain sales at the level she had claimed to achieve.

[10] In response, Ms. Pan simply noted that (i) RMB$60,000 is the minimum requirement to open up a company, (ii) she didn't know she was required to include in her financial statements her contribution to the company of RMB$200,000 in personal savings, and (iii) the sales of RMB$2.4 million achieved in 2002 was in part due to the fact that a number of loyal customers followed her from her previous job.

II. The Decision Under Review

[11] In a short letter, dated August 19, 2009, the Visa Officer informed Ms. Pan that her application had not been approved.

[12] After reviewing the provisions in s. 12(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), and subsections 88(1), 90(1) and 90(2) of the *Regulations*, the letter informed Ms. Pan that she had not satisfied the Visa Officer that she had a legally obtained minimum net worth of at least $800,000. The letter proceeded to identify the following concerns that arose from the information that Ms. Pan had provided in her documentation and at her interview:

- The initial investment of RMB$60,000 into your company does not appear to be sufficient to have obtained the stated sales of RMB$2.4 million in the first year of operation.

- Your statement that you invested an additional RMB$200,000 into the company contradicts the information provided, is unsubstantiated and raises concerns as to the accuracy of the documentation you provided.

- You were unable to clearly describe the business operations or provide specific details regarding what the company sells, raising doubts as to your role in the business and whether the declared funds were in fact earned by you in the business.

[13] The Visa Officer's letter then added: "You were informed of these concerns at the interview and your statement that customers from your previous employment began to do business with your company did not overcome these concerns."

[14] Based on the foregoing, the Visa Officer stated that Ms. Pan had not satisfied him that her personal net worth had been legally obtained, and that therefore she did not meet the requirements of subsection 90(2) of the *Regulations*.

III. Relevant Legislation

[15] The basis for granting a foreign national permanent residence on the basis of the membership in an economic class is set forth in subsection 12(2) of the IRPA, which provides as follows:

Economic immigration	Immigration économique
12.(2) A foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada.	**12.(2)** La sélection des étrangers de la catégorie « immigration économique » se fait en fonction de leur capacité à réussir leur établissement économique au Canada.

[16] The specific requirements that must be met to be granted permanent residence as a member of the investor class are set forth in subsections 88(1), 90(1) and 90(2) of the *Regulations*, which state:

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.
…	…
"investor" means a foreign national who	« investisseur » Étranger qui, à la fois :
(a) has business experience;	a) a de l'expérience dans l'exploitation d'une entreprise;
(b) has a legally obtained net worth of at least $800,000; and	b) a un avoir net d'au moins 800 000 $ qu'il a obtenu licitement;
(c) indicates in writing to an officer that they intend to make or have made an investment.	c) a indiqué par écrit à l'agent qu'il a l'intention de faire ou a fait un placement.

…

Members of the class

90. (1) For the purposes of subsection 12(2) of the Act, the investor class is hereby prescribed as a class of persons who may become permanent residents on the basis of their ability to become economically established in Canada and who are investors within the meaning of subsection 88(1).

Minimal requirements

(2) If a foreign national who makes an application as a member of the investor class is not an investor within the meaning of subsection 88(1), the application shall be refused and no further assessment is required.

…

Qualité

90. (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des investisseurs est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada et qui sont des investisseurs au sens du paragraphe 88(1).

Exigences minimales

(2) Si le demandeur au titre de la catégorie des investisseurs n'est pas un investisseur au sens du paragraphe 88(1), l'agent met fin à l'examen de la demande et la rejette.

IV. The Standard of Review

[17] The issue that Ms. Pan has raised with respect to procedural fairness is reviewable on a standard of correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 55 and 79; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 43).

[18] The issue that has been raised with respect to whether the Visa Officer based his decision on erroneous findings of fact made in a perverse or capricious manner and without regard to the material before him, is reviewable on a standard of reasonableness (*Dunsmuir*, above, at paras. 47 and 53).

[19] In *Khosa*, above, at para. 59, reasonableness was articulated by Justice Ian Binnie as follows:

> […] Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

V. **Analysis**

A. *Did the Visa Officer fail to make his decision in accordance with the principles of procedural fairness?*

[20] Ms. Pan submits that the Visa Officer failed to make his decision in accordance with the minimum degree of procedural fairness owed to her in this case, because he failed to (i) inform her of his concerns regarding the documentation she had provided and to provide her with an opportunity to submit further documentation, and (ii) provide her with an opportunity to respond to extrinsic evidence.

[21] With respect to the first of these points, Ms. Pan referred to Citizenship and Immigration Canada’s Overseas Processing Manual, which states, at paragraph 5.15 of Chapter 9 (OP 9): “When an officer has concerns about eligibility or admissibility, the applicant must be given a fair opportunity to correct or contradict these concerns.” She further noted that paragraph 11.2 of OP 9 states: “When the veracity of the documentation is in doubt, the officer should first request further documentation.” She asserted that these guidelines reflect the minimum duty of fairness that was owed to her and that this duty further requires that a visa officer allow applicants to (i) respond to

any concerns that the visa officer has with respect to the application, and (ii) explain inconsistencies in the evidence.

[22] To support her position that she was not accorded the minimum requirements of procedural fairness, Ms. Pan referred to the computer assisted immigration processing system (CAIPS) notes taken by the initial screening officer who reviewed her application in June 2007. As mentioned at paragraph 6(ii) above, among other things, those notes stated that the audited financial information she provided appeared to be self-serving and were prepared by someone who was believed to have worked with immigration consultants to provide backdated consolidated financial reports for other immigration applicants.

[23] Ms. Pan relies on those CAIPS notes to submit that the Visa Officer did not accept the audited financial statements as reliable proof of her company's financial record, and that he failed to inform her of these concerns or to request further documentation relating to her financial statements. She maintains that the letter sent to her in June 2009 did not suggest that the previously provided documentation was considered insufficient and did not contain any specific request for further documentation regarding the financial statements of her business. She contrasts the contents of that letter with CAIPS notes made by the Visa Officer immediately following her interview, which state: "Applicant's statement that she invested an additional RMB$200,000 into the company contradicts the information provided, is unsubstantiated, and raises concerns as to the accuracy of the documentation provided."

[24] Leaving aside the issue of whether the guidelines set forth in OP 9 accurately reflect the minimum requirements of procedural fairness that are legally required to be accorded to visa

applicants (*Parmar v. Canada (Minister of Citizenship and Immigration)* (1997), 139 F.T.R. 203, at paras. 12 and 13), I disagree with Ms. Pan's assertions regarding the manner in which the Visa Officer dealt with his concerns in relation to the documentation she had provided. In my view, the Visa Officer did not fall short of the minimum requirements of procedural fairness in this regard.

[25] The extent of procedural fairness applicable in any given situation is variable (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 21; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, at para. 113).

[26] In the case of visa applicants, the minimum degree of procedural fairness to which they are entitled is at the low end of the spectrum (*Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297, at para. 41 (C.A.); *Khan v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 345, [2002] 2 F.C. 413, at paras. 30-32; *Patel v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 55, 23 Imm. L.R. (3d) 161, at para. 10).

[27] In general, the onus is on a visa applicant to put his best foot forward by providing all relevant supporting documentation and sufficient credible evidence in support of his application. The onus does not shift to the visa officer and there is no entitlement to a personal interview if the application is ambiguous or supporting material is not included (*Silva v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 733, at para. 20).

[28] In addition, a visa officer has no legal obligation to seek to clarify a deficient application (*Sharma v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 786, at para. 8; *Fernandez*

v. Canada (Minister of Citizenship and Immigration), [1999] F.C.J. No. 994, at para. 13; *Dhillon v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 574, at para. 4), to reach out and make the applicant's case (*Mazumder v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 444, at para. 14), to apprise an applicant of concerns relating to whether the requirements set out in the legislation have been met (*Ayyalasomayajula v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 248, at para. 18), or to provide the applicant with a "running-score" at every step of the application process (*Covrig v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1413, at para. 21). To impose such an obligation on a visa officer would be akin to requiring a visa officer to give advance notice of a negative decision, an obligation that has been expressly rejected (*Ahmed v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 940 (QL); *Sharma*, above).

[29] In this particular case, the duty of fairness owed to Ms. Pan was more than met when she was:

i. provided with a full opportunity to submit whatever materials she thought might assist her to establish the requirements listed in subsection 88(1) of the *Regulations*;

ii. informed in June 2009 that she had not yet met those requirements and was requested to provide updated information and supporting documentation, among other things, to establish her net worth and to provide greater detail with respect to the accumulation of her personal net worth;

iii. invited to attend an interview at which she was asked to provide additional information with respect to the products sold by her business, to explain how she was able to achieve such an "extremely high" level of annual sales in 2002 given her reported initial investment of only RMB$60,000;

iv. informed by the Visa Officer towards the end of the interview that he continued to have concerns that she had still not demonstrated that she had the requisite business experience or sufficient legally obtained net worth to become a permanent resident as a member of the investor class;

v. told why the Visa Officer continued to have those concerns;

vi. provided with one last opportunity to respond to those concerns; and

vii. subsequently provided with detailed reasons explaining why her application was refused.

[30] The letter sent to Ms. Pan in June 2009 explicitly informed her that the information she had submitted in support of her application had failed to satisfy an officer that she met the requirements of the IRPA. That letter also explicitly requested additional financial information "attached with supporting documents to prove your net worth" and "detailing the accumulation of your funds." Contrary to her assertions, as of the time that Ms. Pan received that letter, she was put on clear notice that (i) the information she had provided previously was considered insufficient, and (ii) further documentation regarding the financial statements of her business was required.

[31] Moreover, at her interview in August 2009, the Visa Officer explicitly identified on two separate occasions his concerns regarding the financial documentation that she had submitted; and on both occasions he provided Ms. Pan with a further opportunity to clarify the apparent inconsistencies that he had identified. Unfortunately, the inconsistent responses provided by Ms. Pan failed to address those concerns and may well have strengthened them. Contrary to Ms. Pan's assertions, the questions put to her by the Visa Officer during their interview clearly raised the issue of the accuracy of the financial information that she had previously submitted. In the final analysis, Ms. Pan failed to adequately avail herself of the opportunities that she was thereby afforded to address the Visa Officer's concerns.

[32] When the Visa Officer first asked how Ms. Pan's company could have achieved a level of sales of RMB$2.4 million in its first year of operation, with an initial investment of only RMB$60,000, she replied: "The business grew rapidly over the years." When pressed again on this point, she stated that loyal customers from her previous job had followed her to her new company. When further pressed, she explained that the audited financial statements of her business only identified an initial investment of RMB$60,000 because that was the minimum requirement to open the business. It was not until she was then pressed yet again on this point that she finally revealed that she contributed RMB$200,000 of her personal savings to the company. Even then, she was not able to provide any substantiation for this assertion, notwithstanding the fact that the Visa Officer explicitly noted, towards the end of the interview, that he was concerned that (i) the documentation she provided did not demonstrate that her company was able to obtain sales at the level she had claimed, and (ii) she had not provided any substantiation to support her claim that she had injected additional funds into the company.

[33] Turning to Ms. Pan's claim that the Visa Officer failed to provide her with an opportunity to address extrinsic evidence, she submits that he relied on the extrinsic evidence that was included in the CAIPS notes made in June 2007 by the initial screening officer. Specifically, she submits that the Visa Officer relied upon evidence that her financial statements had been "prepared by Liu Xi who has been partnered with the same immigration reps to provide backdated consolidated financial reports for immigrants to Canada." She asserts that she had no way of knowing that the Visa Officer was suspicious of the Liu Xi accounting firm, because she was never presented with an opportunity to address this evidence.

[34] I am unable to agree with Ms. Pan's submission that the Visa Officer breached a duty of fairness owed to her by failing to provide her with an opportunity to address that evidence.

[35] There is no indication in the Visa Officer's decision, in his CAIPS notes, or elsewhere that he relied on this extrinsic evidence that had been identified by the initial screening officer. As explained in the Visa Officer's decision, Ms. Pan's application was refused because she had not satisfied him that she had a legally obtained minimum net worth of at least $800,000. In turn, the Visa Officer explained that he was not satisfied on this point for the precise reasons that he conveyed to her in her interview in August 2009, which are discussed above at paragraphs 12 and 32. Those reasons concerned Ms. Pan's inability to satisfactorily address issues that arose from the contents of her financial statements, as opposed to the identity of the person who prepared those financial statements.

[36] This Court's decisions in *Chen v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 65, *Kniazeva v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 336, and *Muliadi v. Canada (Minister of Employment and Immigration)*, [1986] 2 F.C. 205 are distinguishable.

[37] In *Chen*, above, at para. 14, the applicant's application was denied after it was discovered, unbeknownst to him, that certain of his client contracts were fraudulent. That decision was set aside on the basis that the applicant had not been provided an opportunity to address all of the fraud reports that had been reviewed by the visa officer. In contrast to the case at bar, that extrinsic evidence was clearly relied upon by the visa officer and was clearly central and important to the visa officer's decision.

[38] Similarly, in *Kniazeva*, above at paras. 23-24, the applicant's application was denied after the Visa Officer relied on extrinsic evidence that was supplied by a senior manager at one of her former places of employment. That evidence suggested that the applicant had only worked part time with the company in question. As a result of that evidence, the applicant was awarded fewer points than she otherwise may have been awarded in the assessment of her application for permanent residence in the skilled worker class. This Court found that that extrinsic evidence gave rise to a "critical discrepancy" with the information provided by the applicant, and that the visa officer's reliance on this evidence may have had an impact on his overall decision. As a result, the Court concluded that the visa officer had breached his duty of procedural fairness to the applicant by not affording her the opportunity to address that evidence.

[39] Likewise, in *Muliadi*, above, at paras. 14-16, the appellant's application for permanent residence was rejected after the visa officer relied upon a negative assessment of his business proposal that had been provided by the Province of Ontario. The appellant was not informed of that assessment or provided with an opportunity to address its contents prior to the visa officer's final decision on his application.

[40] By contrast, as noted above, in the case at bar, there is no indication that the extrinsic evidence in question was relied upon by the Visa Officer or had a material impact on his decision. As confirmed in *Bavili v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 945, at paras. 47-48, there is no duty to disclose extrinsic evidence that is not relied upon.

[41] For the foregoing reasons, I conclude that the Visa Officer did not breach his duty of procedural fairness towards Ms. Pan.

B. *Did the Visa Officer base his decision on erroneous findings of fact made in a perverse or capricious manner and without regard to the material before him?*

[42] Ms. Pan submits that it was unreasonable for the Visa Officer to conclude that the information she provided in her interview and in the documentation submitted in support of her application raised doubts as to her role in her company and as to whether the declared earnings of the company were in fact earned by the company. She further asserts that, in concluding that she had not established that she had a legally obtained minimum net worth of at least $800,000, the Visa Officer reached his decision without regard to the evidence before him. In addition, she submits that there was no evidentiary foundation for the Visa Officer's concerns regarding the level of annual sales of her business, as reflected in the audited financial statements of the business.

[43] I disagree.

[44] With respect to her role in the company, the Visa Officer's concerns arose from Ms. Pan's inability to provide sufficient details regarding what her company sells. When asked what her business does, Ms. Pan replied that the business sells parts for vans and private cars. The following exchange then took place:

> "Q: What part do you sell the most?
> A: 5M, 6BG1, Z22.
>
> Q: What does 5M do?
> A: It's for taxi.
>
> Q: What part of the car does it go in?
> A: In the front of the taxi, so that you can turn on the car smoothly. It's for taxi.
>
> Q: I'm concerned that you are unable to explain what it is that your business sells.
> A: We sell auto parts. Including motors.
>
> Q: I want to know what parts you sell?
> A: We sell the parts individually to whole."

[45] There was no further discussion of this issue.

[46] I am unable to conclude that it was unreasonable for the Visa Officer to have been left with doubts regarding Ms. Pan's role in the business, as a result of the foregoing exchange. While that exchange, alone, may not have given me the same doubts, had I been the Visa Officer, I am satisfied that the Visa Officer's conclusion on this point was well within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para. 47). On an application for judicial review, this Court's task is not to reweigh the evidence.

[47] As to the declared earnings and annual sales of her company, the Visa Officer raised a concern during the interview regarding how Ms. Pan's company could have achieved sales of RMB$2.4 million in its first year given that she had only invested RMB$60,000 in the company. He observed that, based on such a small initial investment, it would have been necessary for her to turn over her entire inventory approximately 40 times in order to achieve that level of sales.

[48] As noted at paragraph 32 above, over the course of repeated questioning by the Visa Officer, Ms. Pan provided several different explanations for how her company was able to achieve RMB$2.4 million in sales in its first year. Based on that verbal exchange, I am satisfied that it was not unreasonable for the Visa Officer to conclude that Ms. Pan's statement that she "invested an additional RMB$200,000 into the company contradicts information provided, is unsubstantiated and raises concerns as to the accuracy of the documentation".

[49] Finally, given the discrepancies in the information that Ms. Pan provided with respect to her financial affairs, I am satisfied that it was reasonably open to the Visa Officer to conclude that Ms. Pan had not satisfied him that she had a legally obtained minimum net worth of at least $800,000. Ms. Pan was provided numerous opportunities to address the Visa Officer's concerns regarding this issue. Unfortunately, she failed to avail herself of those opportunities. In my view, after considering all of the information provided by Ms. Pan, it was entirely reasonable for the Visa Officer to have been left with doubts regarding whether Ms. Pan met this requirement of paragraph 88(1)(b) of the *Regulations* and the requirements of section 90.

[50] The onus was on Ms. Pan to provide sufficient credible evidence in support of her application. Unfortunately, she did not meet that onus.

[51] The Visa Officer's conclusions were all reasonably open to him and his decision fit comfortably with the principles of justification, transparency and intelligibility (*Khosa*, above, at para. 59).

VI. **Conclusion**

[52] This application is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT this application is dismissed.

"Paul S. Crampton"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5339-09
STYLE OF CAUSE:	QUN HUAN PAN v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	May 11, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	Crampton J.
DATED:	August 24, 2010

APPEARANCES:

Michael Greene Ram Sankaran	FOR THE APPLICANT
Rick Garvin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Michael Greene Ram Sankaran Barristers & Solicitors Calgary, Alberta	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT