Federal Court  Cour fédérale

Date: 20190411

Docket: IMM-3668-18

Citation: 2019 FC 439

Ottawa, Ontario, April 11, 2019

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

HOANG BAO TRAN NGUYEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant challenges the decision of a visa officer [Officer], dated July 20, 2018, denying her permanent resident visa application as a member of the start-up business class. The Officer was of the view that the Applicant entered into an agreement in respect of a commitment with a start-up incubator primarily for the purpose of acquiring a status or privilege under the

Immigration and Refugee Protection Act, SC 2001, c 27 [Act] and not for the purpose of engaging in the business activity for which the commitment was intended.

II. Context

A. *The Legal Framework of the Start-Up Business Class*

[2] The start-up business class is a part of the economic class of immigration pursuant to subsection 12(2) of the Act which provides that 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. Under subsection 14.1(1) of this same Act, the Minister of Citizenship and Immigration [Minister] may give instructions establishing a class of permanent residents as part of the economic class and may provide rules governing such class.

[3] The Minister did just that by giving the *Ministerial Instructions Respecting the Start-up Business Class, 2017* (2017) C Caz I, 3523 [*Ministerial Instructions*], which have since been incorporated *mutatis mutandis* into sections 98.01 to 99 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. The *Ministerial Instructions* form the relevant legal framework for the start-up business class and visa officers must comply with them (Act, s 14.1(7)).

[4] Subsection 2(1) of the *Ministerial Instructions* establishes the start-up business class and defines this class as “foreign nationals who have the ability to become economically established in Canada and who meet the requirements of this section”. To qualify for the class, an applicant

must: (i) have obtained a commitment from either a designated business incubator, a designated angel investor group or a designated venture capital fund, listed in schedules 1, 2 and 3 of the *Ministerial Instructions*; (ii) have attained a certain level of language proficiency; (iii) have a certain amount of transferable and available funds; and (iv) have a qualifying business (*Ministerial Instructions*, s 2(2)). Failure to meet these requirements results in a refusal of an application (*Ministerial Instructions*, s 9(1)).

[5] As a further requirement, a visa officer must be satisfied that an applicant's participation in an agreement or arrangement in respect of a commitment is primarily for the purpose of engaging in the business activity for which the commitment was intended and not for the purpose of acquiring a status or privilege under the Act (*Ministerial Instructions*, s 2(5)).

[6] For business incubators, as is the case here, a commitment consists of an agreement between the incubator and the applicant. The commitment confirms, among other things, that the applicant's business is currently participating in or has been accepted into a business incubator program and that the business incubator has performed a due diligence assessment of the applicant and the business (*Ministerial Instructions*, ss 6(4)(b), 6(4)(i)). A visa officer may request that a commitment be independently assessed by a peer review panel – an organization under contract with the Minister that has expertise in respect of the type of entity making the commitment (*Ministerial Instructions*, ss 3(1)(d), 11(1)). A request for an independent assessment by a peer review panel may be made if the visa officer believes it would assist in the application process or may be made on a random basis (*Ministerial Instructions*, s 11(2)).

[7] The peer review panel must provide the visa officer with an independent assessment of whether the entity that made the commitment assessed the applicant and their business in a manner consistent with industry standards and whether the terms of the commitment are consistent with industry standards (*Ministerial Instructions*, s 11(3)). A visa officer who requests an independent assessment by a peer review panel is not, however, bound by it (*Ministerial Instructions*, s 11(4)).

[8] In an affidavit filed by the Minister, a representative of Immigration, Refugees and Citizenship Canada explained that:

> During the processing of an application in the Start-up Business Class, a decision-making officer may request a peer review. The purpose of a peer review is not to establish if a proposed business will prove successful. Rather, peer reviews are independent assessments of the commitment given by the designated entity. They also serve to protect against fraud and to ensure that the activities of both the entrepreneur and the designated entity are consistent with industry standards.
>
> Peer reviews serve to examine the due diligence that was performed by the designated entity. Peer reviews will further consider the terms of the commitment given by the designated entity to the foreign entrepreneur, which may include an investment made by the designated entity and services provided to the entrepreneur. Peer reviews are an important instrument to ensure that designated entities conduct their activities in accordance with the requirements of the Start-up Business Class.
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> (Affidavit of David Cashaback at paras 6-7).

B. *The Applicant's Visa Application*

[9] The Applicant is a Vietnamese national. She applied for a permanent resident visa as a member of the start-up business class in August 2017. Her start-up business was aimed at

developing a global mobile software application to establish a connection between parents, daycares, and nursery schools in the member states of the Association of Southeast Asian Nations. The software would allow users to select the best option for their children from available daycares and nursery schools.

[10] Empowered Startups Ltd. [Empowered], a designated business incubator pursuant to the *Ministerial Instructions*, accepted her venture for incubation and signed a Start-up Business Class Commitment Certificate [Commitment] for the Applicant's start-up.

[11] In December 2017, the Officer requested that the Applicant's Commitment be independently assessed by a peer review panel [Panel]. The Officer sought to determine whether due diligence was completed by Empowered when it accepted the Applicant's business proposal.

[12] On March 6, 2018, the peer review took place by way of telephone conference. Four other applications were considered in the same session. Empowered was represented by its co-founder in addition to its president and general counsel.

[13] Two days later, the Panel found that there had been an insufficient level of due diligence performed by Empowered when accepting the Applicant's business proposal for incubation. In particular, it noted that it was unclear if the Applicant had validated her idea in Vietnam or not, that having staff develop a Natural Language Processing solution in a language they do not speak was problematic, and that it was not normal for the Applicant to have invested over $300,000 without having validated her business solution.

[14] On March 23, 2018, a letter was issued to the Applicant by the Officer [the Procedural Fairness Letter]. The Officer voiced her concerns that Empowered had not performed due diligence when accepting the Applicant's business proposal for incubation. In particular, the Officer indicated that the Applicant had failed to provide sufficient evidence to substantiate the validity of her business solution. She also wrote that it was unclear why her business venture was not started in Vietnam, the country for which the business venture was intended for. Finally, the Officer alerted the Applicant that the Panel had echoed her concerns and had also identified a major flaw in her plan to have staff develop Natural Language Processing solutions in a language they do not speak.

[15] Shortly after, counsel for the Applicant at the time filed an access to information request to obtain a copy of the peer review report and an extension of time to file submissions in response to the Procedural Fairness Letter.

[16] Before receiving a reply to the access to information request, counsel for the Applicant at the time filed reply submissions to the Procedural Fairness Letter. He was of the view that what needed to be substantiated regarding the validity of the Applicant's business solution was not apparent. He stated that Empowered was not informed of any concerns during the peer review session, including the issues surrounding the Natural Language Processing. Finally, because he was unable to obtain a copy of the peer review report, he wrote that he was unable to determine how the Panel came to its conclusions.

[17] In a sworn declaration included in the reply submissions, the Applicant stated that she chose to launch her venture in Canada due to its advantageous economic and fiscal environment and that her discussions with a company she planned to work with did not reveal any problems surrounding the Natural Language Processing.

C. *The Officer's Decision*

[18] On July 20, 2018, the Officer denied the visa application on the basis that the Applicant did not satisfactorily prove that she had participated in the business venture for the purpose of engaging in the business activity for which the Commitment was intended.

[19] According to the Global Case Management System [GCMS] notes, the Officer acknowledged that the Applicant filed her reply to the Procedural Fairness Letter despite the pending access to information request. The Officer highlighted the lack of documentary evidence supporting the Applicant's claims, namely that doing business in Canada was preferable to doing business in Vietnam, that advisors had agreed to help guide her venture, that discussions had been engaged with a university, and finally that the company she planned to work with was of the view that there were no problems with the Natural Language Processing. Finally, the GCMS notes reveal that during a prior review of the file, a visa officer noted that similar software applications to the one the Applicant proposed were already on the market in the United States, in Vietnam, and in Canada.

D. *The Applicant's Claims Against the Officer's Decision*

[20] The Applicant argues that the peer review process was unfair and that the Officer's decision was not intelligible, nor justifiable by the facts.

[21] The Applicant asserts that peer review panels have a duty of procedural fairness towards an applicant, which includes carrying out a thorough assessment of the file, making concerns known and providing an opportunity to respond. Although she concedes that the peer review process was not binding on the Officer's decision, she nevertheless argues that the peer review report amounted to a vote of non-confidence for her visa application. She points out that none of the concerns mentioned by the Officer in the refusal letter were cited as concerns by the Panel during the peer review session. She also argues that the Officer relied on extrinsic evidence, namely the fact that other similar applications existed on the market, without confronting her with this information in the Procedural Fairness Letter, depriving her of a right to reply.

[22] On the merits of the case, the Applicant takes issue with the intelligibility of the Officer's decisions and points to the GCMS notes which indicate suitability for her proposed venture. She also states her incomprehension as to what level of sufficient evidence was necessary to allay the Officer's concerns. She further contends that it is well known that doing business in Canada is preferable to doing business in communist Vietnam. Finally, she states that the Officer simply rejected her affidavit evidence regarding the Natural Language Processing software and that she never made a claim that she or her staff would attempt to create such software, rather, she affirms that a third party would be enlisted to create the software.

III. Issues and Standard of Review

[23] The following issues arise from this case:

1. Was there a breach of procedural fairness, either by the Panel or the Officer?
2. Was the Officer's decision reasonable?

[24] It is well established that questions of procedural fairness are reviewed on a standard of correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Sapojnikov v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 964 at para 18 [*Sapojnikov*]). As highly factual inquiries, decisions rendered by visa officers are reviewed on a reasonableness standard (*Kwan v Canada (Citizenship and Immigration)*, 2019 FC 92 at para 10; *Yang v Canada (Citizenship and Immigration)*, 2019 FC 130 at para 14 [*Yang*]).

[25] Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility of the decision-making process, but is also concerned with whether the decision falls within a range of possible, acceptable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

IV. Analysis

[26] In my view, the Officer committed a fatal error by relying on extrinsic evidence with which the Applicant was never confronted. This breached the Applicant's procedural rights and, and such, the decision must be quashed. It will not be necessary, as a result, to consider the other arguments raised by the Applicant against the Officer's decision.

[27] In the context of a visa application, the case law has held that the level of procedural fairness owed by a visa officer to visa applicants is on the lower end of the spectrum (*Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297 (FCA) at para 41; *Sapojnikov* at para 26; *Yang* at para 22).

[28] Nevertheless, the rules of procedural fairness dictate that a visa applicant ought to know the case to meet, which may be expressed in a procedural fairness letter (*Bayramov v Canada (Citizenship and Immigration)*, 2019 FC 256 at para 15). Extrinsic evidence upon which a visa officer relies must be disclosed to a visa applicant if it may have some bearing on the outcome of the decision (*Sapojnikov* at para 20; *Majdalani v Canada (Citizenship and Immigration)*, 2015 FC 294 at para 37). In essence, the issue to be determined is whether "meaningful facts essential or potentially crucial to the decision had been used to support a decision without providing an opportunity to the affected party to respond to or comment upon these facts" (*Yang v Canada (Minister of Citizenship and Immigration)*, 2013 FC 20 at para 17).

[29] In the instant case, the GCMS notes reveal that the Officer had concerns regarding similar software applications that were already on the market in the United States, Vietnam, and Canada. However, the Procedural Fairness Letter did not put this concern to the Applicant. Therefore, she was never afforded a chance to reply to or comment upon the Officer's concerns.

[30] While I do recognize that an officer's reasons need not be perfect, they must nonetheless allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes (*Newfoundland and*

Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62 at paras 16, 18).

[31] In this case, a fair reading of the decision, including the GCMS notes, does not allow me to decipher what weight the Officer gave to the extrinsic evidence, although it is clear that it carried some weight. Since the impact this evidence had on the decision-making process cannot be measured from the Officer's reasons for the decision, the only fair solution, in my view, is to remit the matter to another visa officer for reconsideration (*Wang c Canada (Citoyenneté et Immigration)*, 2019 CF 284 at para 14).

[32] The Application for Judicial Review will therefore be granted. The parties agree that no question of general importance for certification arises from the facts of this case. I agree.

JUDGMENT in IMM-3668-18

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is granted;

2. The decision of the Officer, dated July 20, 2018, dismissing the Applicant's application for permanent residence as a member of the start-up business class is remitted to a different visa officer for reconsideration;

3. No question is certified.

"René LeBlanc"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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