Federal Court  Cour fédérale

Date: 20191009

Docket: IMM-568-19

Citation: 2019 FC 1275

Ottawa, Ontario, October 9, 2019

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ONUR GUR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Onur Gur makes an application for the judicial review of the decision of a visa officer who refused to issue a permanent resident visa in the self-employed persons class. That decision was made on January 10, 2019 and the judicial review application is made pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA].

I. The facts

[2] The applicant was born in August 1980 and he is a resident of Turkey. He says that he has a certificate in computer programming and has worked as a web graphic designer between January 2001 and June 2009. While working during that period, he also completed a four-year BA program in Economics at a Turkish university.

[3] Beginning in 2008, he and his wife started a business which designs and produces custom-made cakes. They bake cakes for families as well as corporate customers for all types of occasions. It seems that the applicant distinguishes himself by including figurines, 3D "sculptures", as well as different types of characters. Over the years, the business has produced cakes for well-known national and multinational corporations.

[4] The applicant asserts the following in his narrative concerning his baking business:

> Our preliminary research in British Columbia and Canada suggest [*sic*] that there is a rapidly growing market for custom-made cakes throughout BC and Canada and by designing a web-based order, sales and delivery system (in which I have extensive experience) we believe we can set up and run a successful business (especially in an area with customers with higher income levels compared to those in our present location) while contributing to the artistic and cultural life of Canada.
>
> … We have also discovered that in Surrey and the Metro Vancouver area, there is a real shortage of businesses that provide professionally customized 3D cakes with figures.
>
> As indicated in the attached letter and the printouts from the website, in setting up our business(es), we will be receiving valuable advice from a good friend of our family, Mr. Jordan Bayezit, who has been running his own company based in Surrey, BC since 1984, successfully producing "Turkish Delight" candies. He will be sharing his experience and assisting us with the initial

> stages of our self-employment, setting up our business, market research, and advertising.

[5] There is nothing in the record to explain further what the business is about and what the prospects of success are. Other than those assertions, which are not supported by any documentation or evidence, there is nothing on this record that would suggest knowledge of fundamental information such as, for instance, the demand for services of that nature in Lower Mainland British Columbia, or the initial steps leading to self-employment.

[6] The applicant also indicates working professionally as a freelance web designer. Again, there is very little to understand what the business prospects are concerning this kind of work.

[7] Finally, the applicant refers to assets and financial resources available to him and his wife, the said resources having been accumulated from savings over the years. No details are supplied, although the applicant declares being prepared to submit any additional documents about those resources if asked.

[8] The last paragraph of the application (narrative) is in my view also telling. It reads in part:

> I see myself first and foremost as an artist, with extensive real-world business skills at self-employment. As indicated above, my skills and expertise include expert custom cake design, web design, managing and running e-commerce websites, and handling the import/export processes and procedures. Since all of these skills I have […] are transferable to the Canadian market, I believe that having worked with my wife as a team and in partnership for almost a decade now, we can start a new life and businesses in Canada and contribute to Canadian society and culture as two self-motivated and enthusiastic artists and self-employed business

> owners, and to the Canadian economy by hiring Canadians in the operations of our business, and serving the Canadian public.

Presumably, this assertion is made for the purpose of satisfying the requirements for a visa in the self-employed persons class, which is limited nowadays to persons with experience in respect of cultural activities, athletics and the purchase and management of a farm (Section 100 and 88(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the *Regulations*]. Other than stating that he sees himself as an artist, there is not much to support the assertion. Be that as it may, as it can be seen, the applicant relies on his skills to claim that he satisfies the requirements for a permanent visa in the self-employed persons class.

II. The decision

[9] The decision under review concludes that the ability to become economically established in Canada has not been shown. Pursuant to subsection 100(1) of the *Regulations*:

… the self-employed persons 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 self-employed persons within the meaning of subsection 88(1).	[…] la catégorie des travailleurs autonomes 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 travailleurs autonomes au sens du paragraphe 88(1).

[10] The decision-maker finds that the applicant fails to meet the requirement of the definition of a "self-employed person" in subsection 88(1) "because based on the evidence submitted I am not satisfied that you have the ability and intent to become self-employed in Canada" (Certified

Tribunal Record [CTR], p. 3). We find some elaboration of the reasons for the refusal in the notes made by the decision-maker and kept in the global case management system ("GCMS"). The relevant passage reads as follows:

> … Submissions reviewed, however, insufficient information provided regarding the above, applicant stated intention to become self-employed and referred to his previous experiences. Applicant did not submit any further details of his intentions, any plan of activities leading to his self-employment in Canada, any evidence of research of the work and business environment in BC as it may refer to his proposed self-employment, competition, potential employers, clients, costs etc. There is no indication that applicant has made any contacts with parties in Canada in order to research the feasibility of her [*sic*] intended self-employment, demand for her [*sic*] work etc. On the basis of information provided, I am not satisfied that applicant has the ability and intention to become a self-employed person in Canada.
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> Application refused
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> (CTR, pp. 5-6.)

III. Arguments and analysis

[11] The applicant makes three arguments. First, he claims that there was in this case a failure to provide adequate procedural fairness by failing to provide the applicant an opportunity to address the concerns raised by the visa officer. At any rate, says the applicant, the decision is unreasonable. Finally, the applicant, in his written case, spoke of the inadequacy of reasons. However, it was only the first two grounds that were developed at the hearing of this case.

A. *Adequacy of reasons*

[12] Let's dispose first of the last argument. The adequacy of the reasons argument is based on a decision of this Court which, unfortunately for the applicant, has since been overtaken by the

Supreme Court of Canada's case law. The applicant relies exclusively on the case of *Rolfe v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1514 for his proposition that the inadequacy of reasons can be a sufficient ground to be successful on judicial review. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland and Labrador Nurses' Union*], the Court found:

> [14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
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> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
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> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons 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, the *Dunsmuir* criteria are met.

That suffices to dispose of this argument.

B. *Procedural fairness*

[13] The breach of procedural fairness alleged by the applicant relies exclusively on a decision of this Court in *Mohitian v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1393 [*Mohitian*]. In that case, the Court found that the decision of a visa officer was unreasonable because the decision letter and the GCMS notes were fundamentally contradictory. That made the decision unintelligible and, accordingly, unreasonable. The Court went on to comment on the denial of procedural fairness by the visa officer in that case. It appears that the visa request had been in abeyance for more than seven years; in February 2015, the visa officer requested updated forms and documents and that letter contained a detailed two-page checklist as to what forms and other documentation the applicant should submit. The letter did not request that the applicant submit a business plan. Nevertheless, it appears that the visa officer in the decision expressed concerns as to whether the applicant's business plan was realistic. That resulted in the Court finding that "it was not fair in the circumstances of this case for the officer not to have alerted him as to the concerns about his business plan, particularly considering that he was not required by the *Act* or *Regulations* to submit a formal business plan" (para 23).

[14] This is not the situation that presents itself in the case at hand. The applicant in our case is faulted for not having provided sufficient information such that he would establish his ability to become economically established in Canada and become self-employed within the meaning of subsection 88(1) of the *Regulations*. There was never any letter sent to the applicant asking him

to produce information short of a business plan, to then fault the applicant for not having provided a realistic business plan.

[15] The applicant in our case sought to argue that this case is *ad idem* with *Mohitian*. I disagree. The visa officer in this case was simply not satisfied with the information supplied by the applicant. Indeed, that information supplied by the applicant does not establish anything. The fundamental requirement is that an applicant who wants to become a permanent resident on the basis of his/her self-employment must show the ability to become economically established in Canada which, in turn, translates into an "ability to be self-employed in Canada and to make a significant contribution to specified economic activities in Canada" (definition of "self-employed person" at subsection 88(1) of the *Regulations*). It is not sufficient to claim having some abilities and wishing to be self-employed is not sufficient: one has also to show the ability to be self-employed, to create one's own job (in French, "en mesure de créer son propre emploi"). In effect, the applicant did not provide any information that could support his contention that he has the ability to be self-employed in Canada. He is a baker who is capable of producing custom-made cakes. There is no support provided for the statement that there is a rapidly growing market for custom-made cakes throughout British Columbia and Canada. The GCMS notes address specifically this lack of evidence as the visa officer faults the applicant for not submitting any details concerning his intentions or plan of activities leading to his self-employment in Canada. There is not even any evidence of research of the work and business environment in British Columbia. There is no way for the visa officer to be satisfied of the ability of the applicant to become economically established in Canada. This constitutes a far cry from the finding in

Mohitian that a request for more information, which was not the equivalent of a business plan, was turned into an unrealistic business plan.

[16] Our Court has consistently found that the procedural fairness requirements were limited in application for permanent residence. In *Tollerene v Canada (Minister of Citizenship and Immigration)*, 2015 FC 538, the Court agreed with statements made in *Hamza v Canada (Minister of Citizenship and Immigration)*, 2013 FC 264 [*Hamza*] where the Court stated at paragraph 23 that "the duty of procedural fairness owed by visa officers is on the low end of the spectrum [case law cited omitted]". At paragraphs 24 and 25, the *Hamza* Court states:

> [24] Third, a visa officer has neither an obligation to notify an applicant of inadequacies in his or her application nor in the material provided in support of the application. Furthermore, a visa officer has no obligation to seek clarification or additional documentation, or to provide an applicant with an opportunity to address his or her concerns, when the material provided in support of an application is unclear, incomplete or insufficient to convince the officer that the applicant meets all the requirements that stem from the Regulations [case law cited omitted].
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> [25] Nevertheless, a duty to provide an applicant with the opportunity to respond to an officer's concerns may arise when the officer is concerned with the credibility, the veracity, or the authenticity of the documentation provided by an applicant as opposed to the sufficiency of the evidence provided.

[17] The same is found in an even more recent case; in *Lv v Canada (Minister of Citizenship and Immigration)*, 2018 FC 935, this Court stated the following:

> [23] In the context of permanent residence applications, an immigration officer has no legal obligation to seek to clarify a deficient application, to reach out and make the applicant's case, to apprise an applicant of concerns relating to whether the requirements set out in the legislation have been met, to provide the applicant with a running score at every step of the application

> process, or to offer further opportunities to respond to continuing concerns or deficiencies [case law omitted].To impose such an obligation on a visa officer would be akin to giving advance notice of a negative decision, an obligation that has been expressly rejected by this Court on many occasions [case law omitted].

C. *Reasonableness*

[18] Finally, the applicant contends that the decision is unreasonable. I fail to see how this decision can be said to be unreasonable. In effect, the applicant speaks of his ability to produce special cakes and his belief in a rapidly growing market for custom-made cakes in Canada. This Court commented recently in *Wei v Canada (Minister of Citizenship and Immigration)*, 2019 FC 982 that a measure of precision is required in order to satisfy the test of the ability to become economically established in Canada. At paragraph 44 of that decision one can read:

> As a final word on the subject, the manner whereby the three requirements of experience ability and intention come together to demonstrate a viable economic venture will vary depending upon the circumstances. In this matter, the project of making a series of films for television is a multitasked undertaking involving many forms of cultural activities and other trades associated with producing and marketing a successful film. Smaller scale projects can better leverage personal experience and ability to establish probabilities of success in a specific cultural economic activity with accordingly less onerous past commitments needed to demonstrate a likely intention to follow through on the activity. However, fundamental to every application is a demonstration that the projects have been thoroughly conceived and concrete steps taken to ensure the implementation that will result in a successful economic activity to meet the requirements of a self-employed immigrant under section 88(1).

It seems to me that such a comment stands to reason and I share the view expressed in that case. The visa officer's decision not to conclude that the applicant's burden to show the ability to become economically established in Canada is eminently reasonable. The application does not

evince the kind of precision needed in order to satisfy someone of the test provided at sections 100 and 88 of the *Regulations*. The reasons given by the visa officer and the GCMS notes provide the Court with enough to conclude that the result reached falls within a range of possible outcomes. The reasons read with the record convince me that the decision satisfies fully the requirement of reasonableness.

[19] The applicant also contends that there is on the part of the visa officer a failure to consider evidence of financial ability. However, there is no such requirement in our law to consider all arguments as "(a) decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (*Newfoundland and Labrador Nurses' Union*, at para 16). The real test is captured in the last sentence of paragraph 16 of *Newfoundland and Labrador Nurses' Union*: "In other words, if the reasons 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, the *Dunsmuir* criteria are met".

[20] There is no doubt in my view that the availability of significant assets is a relevant factor. But it cannot be said that it is a determinant factor where the record does not provide any information of sufficient precision as to how the proposed self-employment can be made successful. The financial resources, assuming that they would be sufficient, which is not proven, cannot be said to clearly pointing to an opposite conclusion such that the Court may intervene and infer that the tribunal overlooked the contradictory evidence when making its finding of fact (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35).

IV. Conclusion

[21] It may be worth recalling that reasonableness is a deferential standard. It is for an applicant to carry the burden of showing that a decision is not reasonable, as the notion is defined at paragraph 47 of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[22] In *Canada (Attorney General) v Heffel Gallery Limited*, 2019 FCA 82, the Federal Court of Appeal noted that the review for reasonableness should start with the decision that was made in order to avoid turning reasonableness into correctness as a court which would have opined on what it considers to be reasonable may in fact exclude any other assessment as being reasonable. In this case, the reasons given for refusing the permanent resident visa are clear and, in my estimation, perfectly reasonable once the record before the visa officer has been reviewed. To put it differently, the reasons when considered together with what was offered by this applicant for the purpose of satisfying the test at sections 100 and 88 of the *Regulations* satisfies the requirements of the process of articulating the reasons and the possible outcomes. The deference

owed to the decision commands that this Court not intervene in view of the reasons given and the possible acceptable outcomes.

[23] As for the alleged violation of procedural fairness, there is no requirement in our law to give an applicant a running score as to whether or not sufficient evidence has been provided. The decision of this Court in *Mohitian* is of a different ilk and is of no assistance to the applicant.

[24] It follows that the judicial review application has to be dismissed. The parties are in agreement that there is no serious question of general importance that ought to be certified. The Court shares that view.

JUDGMENT in IMM-568-19

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed.

2. There is no serious question of general importance that ought to be certified.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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