Federal Court  Cour fédérale

Date: 20230606

Docket: IMM-5418-22
IMM-5416-22
IMM-5414-22

Citation: 2023 FC 788

Ottawa, Ontario, June 6, 2023

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

NAZANIN AJILI
ALIREZA NEGHABI
LEILI NOUROLLAHI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] These are three judicial review applications which were heard together. The three applications deal with the same issues and involve the same business venture. Accordingly, our Court agreed that the three applications should be heard together (order consolidating the Court files) with file IMM-5418-22 being designated as the lead file. Only one Applicants' Record was

filed. As provided for in the Order of Associate Judge Steele of July 8, 2022, a copy of this Judgment will also be put on related files IMM-5416-22 and IMM-5414-22.

[2] The lead Applicant, Ms. Nazanin Ajili, wishes with the Applicants in the other files to start a new business endeavour in Canada. They are all citizens of Iran.

[3] The Applicant seeks the judicial review of the refusal by a visa officer of her application for permanent residence under the Start-up Visa program. The judicial review was authorized pursuant to s 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27 [the Act or the IRPA]. The program is governed by the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations]. The relevant provisions are found at sections 98.01 to 98.13 of the Regulations, together with section 89, which, as we shall see, features prominently in this case. It reads:

Artificial transactions	**Opérations factices**
89 For the purposes of this Division, an applicant in the self-employed persons class or an applicant in the start-up business class is not considered to have met the applicable requirements of this Division if the fulfillment of those requirements is based on one or more transactions that were entered into primarily for the purpose of acquiring a status or privilege under the Act rather than	**89** Pour l’application de la présente section, ne satisfait aux exigences applicables de la présente section le demandeur au titre de la catégorie de travailleur autonome ou de la catégorie « démarrage d’entreprise » qui, pour s’y conformer, s’est livré à des opérations visant principalement à acquérir un statut ou un privilège sous le régime de la Loi plutôt que :

(a) in the case of an applicant in the self-employed class, for the purpose of self-employment; and	**a)** s'agissant d'un demandeur au titre de la catégorie des travailleurs autonomes, dans le but de devenir travailleur autonome;
(b) in the case of an applicant in the start-up business class, for the purpose of engaging in the business activity for which a commitment referred to in paragraph 98.01(2)(a) was intended.	**b)** s'agissant d'un demandeur au titre de la catégorie « démarrage d'entreprise », dans le but d'exploiter l'entreprise envers laquelle a été pris un engagement visé à l'alinéa 98.01(2)a).

I. The facts

[4] The Applicant contends that she and her associates qualify under the Start-up Business Class. Accordingly, they "may become permanent residents on the basis of their ability to become economically established in Canada" (s 98.01(1) of the Regulations).

[5] In support of their contention, they claim that they have satisfied the requirements to be a member of the Start-up Business Class which are found in s 98.01(2):

- they have obtained a commitment from a designated entity which falls in one of three categories: business incubator, angel investor groups and venture capital funds;
- they have submitted the positive results of a language test;
- they have a certain amount of transferrable and available funds; and
- they have started a qualifying business.

[6] It is s 98.06 which provides for the conditions that will make for a qualifying business. They are:

- the Applicant will provide active and ongoing management from within Canada;
- an essential part of the operations is conducted in Canada;
- the business is incorporated in Canada; and
- there is an ownership structure that complies with some conditions.

[7] The Applicant claims that the conditions have been met, yet she was refused the permanent resident visa she sought. As was already mentioned, the reward for meeting the conditions required to be a member of the Start-up Business Class is the ability to immigrate to Canada, that is to become a permanent resident because of the ability to become economically established in this country.

II. The position of the Applicant

[8] The Applicant submitted an application under the Start-up Business program with a view to obtaining the permanent resident visa on March 3, 2020. Among various documents submitted at various points in time in support of the application were:

- A business plan for what is presented as a communication solution for seniors. It runs for 42 pages.
- An agreement with York Entrepreneurship Development Institute, which presents itself as a registered charity delivering services to entrepreneurs and start-up businesses. The Client Agreement speaks of services such as early-stage business development skills training, education and mentoring. The record did not disclose if an agreement like that satisfies the requirement that there be a commitment from a designated entity, such designated entity falling in one of the three categories of s 98.03(1); business incubators, angel investor groups and venture capital funds (January 17, 2020).

- A contract with an Iranian consultant to design, produce and develop software. The contract was to expire on August 5, 2020; the contract did not spell out what the software was to achieve, nor in connection to what product it was to be used (February 20, 2020).

- An expression of interest for a product, that is not described, by an Iranian elderly centre (September 1, 2020).

- An expression of interest for a product that is referred to as being in a "brochure of Talkbooth" (the name given to the business venture) by an elderly charity institute in Iran (November 17, 2020).

- An expression of interest by a design studio in Toronto (In-Store) to "develop user interface (UI) and user experience (UX) necessary for your Talkbooth application and defined its functionality and major goals" (February 4, 2021).

- An expression of interest by IMS Style to assist in the design and the development of the interior elements for the Talkbooth station. It looks like IMS Style, located in the Greater Toronto region, was approached through an email and the response about cooperating came through the same channel (February 3, 2021).

- An expression of interest by a non-profit community centre in the Toronto region which indicated a desire "to try your product as soon as it becomes available" (July 7, 2021).

[9] On September 28, 2021, a letter came from the Department of Citizenship and Immigration for some information to be supplied in order to make a decision on the application for permanent residence. The letter asked of Ms. Ajili, *inter alia,* a bank statement, a business plan and the up-to-date progress and growth of the business. I note that the application under the Start-up Business Class had been made some 18 months before on March 3, 2020.

[10] A response came on October 15, 2021. A certificate of incorporation, dated September 29, 2021, certified that Talkbooth Inc. is a corporation incorporated under the laws of Ontario. An application for a US Patent for a soundproof telecommunication kiosk with self-tightening and self-locking mechanisms appears to have been filed on October 4, 2021.

[11] Evidently, the information supplied after September 28, 2021, left something to be desired as the immigration officer provided the Applicant with a letter, dated December 7, 2021, raising specific concerns with the Applicant.

[12] The letter, often referred to as a "fairness letter", addresses specifically, and at length, the condition under the Regulations to be a member of the Start-up Business Class (s 98.01(2)) and what constitutes an artificial transaction (s 89(b)). The letter then proceeds to spell out specific concerns. The fundamental concern is that "your primary purpose for entering into a commitment with the designated entity York Entrepreneurship Development Institute [YEDI] is for the purpose of acquiring a status or privilege under the Act".

[13] A question would be what is the basis for that concern that there is a transaction which would qualify under s 89(b) as an artificial transaction. Thus, the fairness letter supplies the basis for the fundamental concern:

- The business market is primarily in Iran; the letters of interest are largely from businesses in Iran and the software is to be developed in Iran.
- There has been a lack of progress in the business venture. The incorporation of the company came very late, indeed after the letter for additional information. The same is true of the trademark registration.
- The business plan is unclear as the Talkbooth seems to be more an application than a booth. Furthermore, it is unknown what the production costs are, how an elderly person with mobility issues would access the booth or where the company will operate. The bullet in the letter concludes with "etc".

As a general comment, the fairness letter states that there "appears to be an overall lack of seriousness on your part and your team's part, as well as on the designated entity's part" (YEDI). In essence, the application may be for the purpose of acquiring a status or privilege under the Act.

[14] In a nine-page letter dated January 6, 2022, counsel for the Applicant sought to disabuse the visa officer of the concerns articulated.

[15] The Applicant plainly denies having entered a commitment with YEDI for the purpose of acquiring a status or privilege. It remained unclear what the commitment was as the letter speaks of no transaction having occurred between the Applicant and YEDI, as the only agreement is for the Applicant to occupy an office (or share an office) in one of YEDI's campus facilities, for one year, to work on their business project under the supervision of an assigned mentor (there is a price, not mentioned in the letter, for the renting of the facility, but no cost associated with the availability of a mentor).

[16] Whereas the US patent application was for a soundproof kiosk and the business plan is unclear as to what the product is, the letter says that Talkbooth Inc. is an IT-based company. The letter then tackles the concern about the market being primarily in Iran and the software being developed in that country. Because the company needs to be ready to test its product upon entry onto the Canadian market, the software had to be developed in Iran. However, it is announced that the software development is an ongoing process that will continue in Canada. Without any

explanation and evidently with little tangible progress to report, the letter projects that the company will have 15 employees by the 5th year of operation in Canada.

[17] The letter tries to argue that there has been progress on three fronts despite the Covid-19 pandemic: software development (about which very little is said, let alone results that were achieved), the design of a booth and market development. The letter speaks of 1,283 retirement homes in Ontario. 538 of them were said to have been contacted with an expression of interest coming from one. On the design of the booth, the letter references the expression of interest in entering into a business arrangement (IMS Style and In-Store) a year earlier. No further development was noted. The Applicant also claims as progress a bare-bones patent application in the United States, as well as late incorporation of the company and the registration of a trademark.

[18] Finally, the letter seeks to explain its business plan. The letter suggests that the concept is a unique communication application and a booth in three designs: a tablet on a stand, a wall-mounted partition and a booth assembled without tools, thanks to the proprietary wall locking mechanisms. What is unique is not explained. The letter declares that each booth will contain all the software pre-installed. What is the software to accomplish exactly is not disclosed in the letter; as noted before, the Applicant claims that the software development will continue on an ongoing basis. Not much is known about the software or its state of readiness. The plan to generate revenues, presumably an important feature of any business plan, is rather murky. The letter speaks of a fee of $1,000 per booth for the installation with a monthly fee of $80/month. There is no indication as to the costs of the booth and for their installation: more fundamentally,

there is no indication in the letter how the promotors hope to generate interest in their product and what may realistically be the revenue stream. As the letter discloses, out of 538 cold calls and emails to prospective clients, only one expression of interest was received. Indeed, the letter discloses that the expression of interest in Iran (two elderly centres) came as a result of the other two Applicants' personal contacts with the two institutions.

III. The decision under review

[19] Contrary to the original Applicant's contention, the decision under review is not only the letter of May 3, 2022. After reproducing once again sections 98.01(2) and 89(b) of the Regulations, the visa officer who reviewed the Applicant's application states in the letter of May 3:

> On 2021/12/07, a procedural fairness letter was sent to you, outlining my concern that your primary purpose in entering the commitment with the designated entity, York Entrepreneurship Development Institute, is for the purpose of acquiring a status or privilege under the Act. I have reviewed and considered the information and documentation you have submitted in response to the procedural fairness letter on 2022/04/27. However, it was not sufficient to alleviate my concerns.
>
> I am therefore satisfied that your primary purpose in entering the commitment with the designated entity York Entrepreneurship Development Institute is for the purpose of acquiring a status or privilege under the Act, and described under R89(b) of IRPR. Therefore, you are not a member of the Start-up Business Class as described under R98.01(2)(a). I am therefore refusing your application.

[20] At the hearing, counsel for the Applicant contended that these reasons are deficient in that the reasons for the conclusion reached are lacking. However, the reasons are not limited to the official decision of May 3, 2022. The Supreme Court of Canada confirmed in *Baker v*

Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, that the notes made by an immigration officer constitute a record of the reasons for making the decision:

> 44 In my view, however, the reasons requirement was fulfilled in this case since the appellant was provided with the notes of Officer Lorenz. The notes were given to Ms. Baker when her counsel asked for reasons. Because of this, and because there is no other record of the reasons for making the decision, the notes of the subordinate reviewing officer should be taken, by inference, to be the reasons for decision. Accepting documents such as these notes as sufficient reasons is part of the flexibility that is necessary, as emphasized by Macdonald and Lametti, *supra*, when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways. I conclude that the notes of Officer Lorenz satisfy the requirement for reasons under the duty of procedural fairness in this case, and they will be taken to be the reasons for decision.

[21] We have in this case notes which shed light on the reasons leading to the conclusion. I choose to reproduce the portion of the Global Case Management System [GCMS] created on May 3, 2022, that are directly relevant to the actual decision made:

> The applicants for permanent residence under the Start-up Business class are a team of 4, including all essential members. The present application was received on 2020/02/28. Subsection 89(b) of IRPR states the following: 89 For the purposes of this Division, an applicant in the self-employed persons class or an applicant in the start-up business class is not considered to have met the applicable requirements of this Division if the fulfillment of those requirements is based on one or more transactions that were entered into primarily for the purpose of acquiring a status or privilege under the Act rather than: (b) in the case of an applicant in the start-up business class, for the purpose of engaging in the business activity for which a commitment referred to in paragraph 98.01(2)(a) was intended. A reply from applicant lawyer to Procedural Fairness letter sent on 2021/12/07. PA's lawyer has answered all concerns, however, they do not alleviate my doubt for

their lack of seriousness. Officer has requested on 2021/09/28 an up-to date progress and growth of the product and a very little progress are [*sic*] noticed. Based on the documentation provided, there are still no actual in-progress accepted proposals between the PA's business and any local Canadian company. Therefore, I am not satisfied that the business will eventually be targeting the Canadian market, as projected in their business plan. For instance, the communication with Victoria Kadysh, interior design, from IMS style was dated from 2021-02-03, however, no progress has been shown ever since such as contract, cost estimation for production or payment detail and the proof of communication provided seems to be writing on a document editor before submitting in PDF form. Currently, PA have hired Iran base IT solution provider, Pars Tasmin and multiple test [*sic*] are done in Iran as well. No further information such as contract or payment detail other than the letter of interest with IN-STORE Canada. A Canadian website www.talkbooth.ca is created, however, the tabs are still very simple and no business inquiry section are [*sic*] available other than contact information. In the letter from lawyer, she stated that the letter of support are [*sic*] opinion to help them identify and present the advantages of their own product. Hence, the market research are [*sic*] most likely done in Iran rather than Canada. The main focus of the business is creating a video chat system for seniors including a tablet with a mobile application and a customize station. Some information in their business plan are [*sic*] still unclear. They have identify [*sic*] the cost for installation in their business plan, the financial projections and profits as per page 17 but they did not include the cost of the product, the depreciation of their asset and etc. Throughout their business plan, they only demonstrate all the advantages of their product against competitive [*sic*] but they seems [*sic*] not [*sic*] consider the cons that are present in their proposal and the market. Moreover, the fact that PA has submitted trademark and corporation certification request after demand, although there is no timeline defined as per paragraph 98.01(2)(d) and subsection 98.06(1), it does not alleviate my concern of PA seriousness for their business based on a balance of probabilities. ***FINAL DECISION*** Considering the little progress made by members while in Canada, the poor quality of the applicants' original business plan and website, provide on demand [*sic*], hired a foreign IT solution provider, I remain concerned by what appears to be a lack of seriousness on the part of the applicants' [*sic*]. I am therefore satisfied, on the balance of probabilities, that the primary purpose of the applicants in entering the commitment with the designated entity York Entrepreneurship Development Institute is for the purpose of acquiring a status or privilege under the Act, and described under

> R89(b) of IRPR. Therefore, the PA is not a member of the Start-up Business Class as per R98.01(2)(a).

IV. Argument and Analysis

[22] The Applicant's argument was not completely clear. It started with a contention that the decision under review was not reasonable, but seemed to switch over to an allegation that there was somehow a violation of the procedural fairness requirements calling for a standard of review of correctness.

[23] The only way to adequately consider the submissions in this case is, in my estimation, to consider three categories: the procedural fairness argument, the reasonableness of the decision itself and the quality of the reasons given by the decision maker.

[24] First, the Applicant suggests at paragraph 48 of her factum that given that she was proactive despite the pandemic, and she showed initiative, the Respondent breached the duty to act fairly by rendering an unreasonable decision. As I stated during the hearing, there is just no such thing as conflating procedural fairness, which deals with the process leading to a decision, and the reasonableness of a decision, which is the outcome of a process, not the process itself. This generic contention has no merit and counsel did not argue the matter. The Applicant also argued that it was not known that the decision maker was concerned that the primary purpose in entering the commitment with YEDI was for acquiring a status or privilege under the IRPA. She claims that "nothing in the records shows the concern was identified to the Applicant" (factum, para 53), with the result that the Applicant did not know what was the case to meet. That would constitute a denial of procedural fairness. But this is not accurate. In fact, the procedural fairness

letter of December 7, 2021, stated the very concern the Applicant claims was unknown to her. It could not have been any clearer. Accordingly, the procedural fairness argument is dismissed.

[25] At some point, the Applicant also contended that the decision is unreasonable because, she says, there was progress in her business venture, progress that the decision maker refused to acknowledge.

[26] A reviewing court does not delve into the merits of a decision. Its role is to ascertain if the decision is legal, that is whether it is reasonable. The Supreme Court of Canada in *Canada (Minister of Immigration and Citizenship) v Vavilov*, 2019 SCC 65 [*Vavilov*], provides the modern framework used to control the legality of a decision.

[27] The fundamental principle for the reviewing court is that of restraint (*Vavilov*, para 13), where the posture is that of respect towards the decision made by the administrative tribunal. The reviewing court intervenes solely once it has been demonstrated by an applicant, on a balance of probabilities, that the decision under review does not bear "the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, para 99). An alleged flaw must be more than superficial or peripheral to the merits (*Vavilov*, para 100).

[28] There are two types of fundamental flaws identified by the *Vavilov* Court: a failure of rationality internal to the reasoning process and where a decision is untenable in light of the relevant factual and legal constraints relevant to that particular case.

[29] Nothing of the sort was alleged, let alone demonstrated, in the case at bar. It boils down to a disagreement with the decision made, as opposed to showing that it is unreasonable. In effect, the Applicant contends that progress was made. She attempts to justify that the small steps taken in the business venture showed enough progress to dispel the notion that the application under the Start-up Business Class did not include an artificial transaction within the meaning of s 89 of the Regulations. The Applicant failed to discharge her burden. Having reviewed the record with care, the Court can only attest that there was ample justification for the decision maker to consider that the project lacked seriousness. The business plan never identified what the product would be, how it would be created and what was unique about it. There was no evidence that it could generate a revenue stream; the costs associated with the project were not identified, nor were the steps to be taken to actually manufacture the booths. In effect, it was an idea that was not fleshed out.

[30] Finally, at the hearing, the Applicant tried to suggest an argument that the decision maker failed to engage in a proper consideration and analysis of the application. This was taken at the hearing as a failure to satisfy the requirement about the decision making process.

[31] The *Vavilov* framework speaks of reasonableness review being concerned not only with the outcome, whether or not a decision is reasonable, but also about the decision making process. The reviewing court is to refrain from deciding the issue; it must rather control the administrative decision on the basis of its reasonableness (*Vavilov*, para 83). That includes that there be adequate reasons where reasons are required.

[32] It follows that the reasons given to reach an outcome are important. Do the reasons convey that the decision is based on an internally coherent and rational chain of analysis? Do they provide a justification in relation to the facts and the law that have the effect of constraining the decision maker? If that is so, the reviewing court is instructed to defer to such decision (*Vavilov*, para 85).

[33] One thing is for sure: the public power exercised by a decision maker must be justified, intelligible and transparent in reality, not in the abstract. The reviewing court will read the reasons given in light of the record and with an understanding of the administrative setting in which the decision maker is operating.

[34] The Applicant, neither in her written submissions nor at the hearing before this Court, articulates how the decision making process was deficient, other than claiming that the outcome was inadequate and the reasons in the official letter of May 3 do not justify the outcome.

[35] Here, the Applicant claimed that the decision did not provide reasons because the letter of May 3, 2022, did not offer the reasoning. As pointed out at the hearing and in these reasons, such an argument does not account for the notes which form part of the decision and provide the rationale for the outcome. The Applicant then contended that the reasons given in the notes were not sufficient. I disagree.

[36] The reasons given amply provide the rationale followed by the visa officer. A fairness letter had been sent to the Applicant and the response, rather long, was fundamentally a rehash of

what had already been supplied. As stated in the notes, counsel for the Applicant sought to answer all concerns raised by the decision maker, but without alleviating the doubt entertained about the lack of seriousness. The notes, which are reproduced in large part at paragraph 21 of these Reasons for Judgment, then give chapter and verse why the decision maker concluded that one or more transactions were entered into primarily for the purpose of acquiring a status or privilege under the IRPA.

[37] As instructed by the Supreme Court of Canada, I have considered the record submitted to the Court and the administrative setting has been part of the general understanding to appreciate the reasonableness of the decision, both as to its outcome and decision-making process. There is nothing that could make the Court deviate from concluding that the decision under review is reasonable.

V. Conclusion

[38] The judicial review application must therefore be dismissed, as the decision under review was reasonable, both as to the outcome reached and the decision-making process followed. Moreover, there was no failure of procedural fairness required in dealing with this matter.

[39] The parties were canvassed and they both confirmed that there is no serious question of general importance that ought to be stated. This is a conclusion shared by the Court.

JUDGMENT in IMM-5418-22, IMM-5416-22 and IMM-5414-22

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed.

2. There is no question to be stated pursuant to section 74 of the *Immigration and Refugee Protection Act*.

3. A copy of this Judgment and Reasons will be placed on the related files IMM-5416-22 and IMM-5414-22.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5418-22 IMM-5416-22 IMM-5414-22
STYLE OF CAUSE:	NAZANIN AJILI, ALIREZA NEGHABI, LEILI NOUROLLAHI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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