Date: 20080429

Docket: IMM-3366-07

Citation: 2008 FC 550

BETWEEN:

DMITRY DENISOV

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

GIBSON J.

INTRODUCTION

[1] These reasons follow the hearing on the 15th of April, 2008, at Toronto, of an application for judicial review of a decision of a Counsellor (Immigration), (the "Officer") at the Canadian Embassy in Moscow, Russia, dated the 13th of June, 2007, wherein the Officer determined that the Applicant did not meet the requirements of the *Immigration and Refugee Protection Act*,[1] and related Regulations[2] for a permanent resident visa as an entrepreneur. The Officer wrote:

> You do not come within the meaning of entrepreneur because: you have not satisfied me that you have business experience as a defined in the regulations because you did not manage a qualifying business. As a result, you do not meet the requirements of subsection 97(2) of the regulations.
>
> [emphasis added]

[1] S.C. 2001, c. 27.

THE BACKGROUND

[2] The Applicant attests that he is a "entrepreneur" from Russia, is married and he and his wife have one daughter. In 2005, he and his wife and daughter applied for permanent residence in Canada, at the Canadian Consulate (sic) in Moscow in the Business (Entrepreneur) immigrant category. He further attests that on the 4th of February, 2005, an immigration file was opened in his and his family's immigration matter.

[3] The Applicant further attests:

> At the time of the Visa Officer's decision on my application I had management and control of a percentage of the equity in the following businesses:

Legal Name	**Zodchiy Ltd.**	**Centrpolytech Ltd.**	**Kratos USA Inc.**
Location	Togliatti, Russia	Moscow, Russia	Florida, USA
Equity %	50%	37.5%	25%
Annual Sales in 2005 (CND$)	718,641.00	1,462,172,04	192,102.70 (in 2004)
Annual net income in 2005 (CND$)	106,114.68	129,548.16	1,733.59 (in 2004)
Employees in 2005	9	10	3
Net assets at year end in 2005 (CND$)	308,576.52	725,538.24	125,666.33 (in 2004)

[4] Over the period of time leading to the decision under review, the Applicant provided very substantial documentation relating to the three (3) businesses identified in the foregoing table.

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[2] *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[5] The Applicant and his spouse were interviewed by the Officer on the 16th of October, 2006. At the close of the interview, the Officer entered the following paragraph into the CAIPS record relating to the Applicant's application:

> After more than one hour of interview, I am not satisfied he [the Applicant] meets the definition of an entrepreneur. I am providing Applicant with no more than 60 days to submit the required translations of his documents, while I review the thick docs previously submitted.

Under date of the 29th of January, 2007, the following entry appears in the CAIPS notes:

> Thick docs of additional documents reviewed. However, they do not address my concerns – Applicant, in my opinion, is not involved in the management of the main company, and even if he was, it is not a qualifying business under IRPA [the *Act*]. Photos made after interview are not conclusive evidence that subject would be working with [another applicant and co-shareholder] in the management of that business, … .
>
> I have no reason to believe Applicant meets the definition of entrepreneur under IRPA. At best, he is only registered by a friend for other purposes, but not for the management of the friend's business.

The decision under review followed almost five (5) months later.

THE LEGISLATIVE SCHEME

[6] The legislative scheme in respect of the "economic class" of immigrants to Canada, including "entrepreneurs", is rather complex. The relevant provisions of the *Act* and *Regulations* are set out in Annex 1 to these reasons.

THE ISSUES

[7] In the Memorandum of Argument filed on behalf of the Applicant, the following issues are identified:

> …

> 26. Did the Visa Officer ignore relevant evidence, misconstrue the evidence before him and make findings that were patently unreasonable so as to constitute a reviewable error?
>
> 27. Did the Visa Officer err in law in refusing the application, because he failed to take into account the totality of the evidence, made unreasonable inference and considered irrelevant and extraneous matters?
>
> 28. Did the Visa Officer err by failing in his duty to make an administrative decision in a procedurally fair manner?
>
> 29. Did the Visa Officer err in awarding the Applicant no weight, in his assessment of the Applicant's ability to do business in Canada?
> …

[8] In addition to the foregoing issues, as on all applications for judicial review such as this, the issue of standard of review arises. In what follows, I will deal first with the issue of standard of review, secondly with the issue of procedural fairness and thirdly with the remaining three (3) issues identified on behalf of the Applicant all of which, I am satisfied, are issues of the weighing and evaluation of the evidence provided by the Applicant.

ANALYSIS

a) Standard of Review

[9] In the aftermath of the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*,[3] my colleague Justice de Montigny commented on the standard of review of decisions of visa officers, such as the decision here under review, in *Belkacem v. Canada (Minister of Citizenship and Immigration)*.[4] Paragraphs [11] to [14] of his reasons are set out in full in Annex 2 to these reasons. It is particularly noteworthy that Justice de Montigny endeavours to rationalize the decision in *Dunsmuir v. New Brunswick* with this Court's obligation created by paragraph

[3] 2008 SCC 9, March 7, 2008.
[4] 2008 FC 375, March 25, 2008.

18.1(4)(d) of the *Federal Courts Act*[5] to grant relief on an application for judicial review such as this where a federal board, commission or other tribunal, here the Officer, based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it. I am satisfied that that statutory obligation applies to findings of fact made by the Officer whose decision is here under review. I am further satisfied that such findings of fact, when applied against the statutory framework to determine whether or not an individual such as the Applicant is an "entrepreneur", are deserving of very substantial deference from this Court.

[10] Issues of procedural fairness were not impacted by the *Dunsmuir* decision. Failure to afford procedural fairness that is owed in the context of any judicial review results in reviewable error.

b) Procedural Fairness

[11] The interview by the Officer with the Applicant and his spouse was conducted with the aid of an interpreter provided by the Canadian Embassy in Moscow. In the affidavit of the Applicant filed on his behalf in this matter, the Applicant attests:

> During the interview, I recognized and pointed out to the Visa Officer, numerous inaccuracies in the interpreter's translations of specialized industrial and legal terms. In fact, written reasons for decision represented by Computer Assisted Immigration Processing System entries ("CAIPS"), set out the Visa Officer's (mis)understanding of my answers, with respect to the re-organization of Zodchiy Ltd.

The Applicant continues in his affidavit with a significant wide range of examples of "inaccuracies" in the interpretation provided at the interview.

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[5] R.S.C. 1985, c. F-7.

[12] First, it must be pointed out that interpretation was provided at the interview because the Applicant himself was uncomfortable in proceeding in English. That being said, his affidavit filed on this application for judicial review is in English and is without a certificate of translation. Secondly, the Applicant's assertion that he "recognized and pointed out to the Visa Officer, numerous inaccuracies in the interpreter's translations" is contradicted by the affidavit of the Visa Officer filed on behalf of the Respondent. The Visa Officer attested:

> …
> 6. On November 16, 2006, I interviewed the Applicant, as well as the two business partners, as identified in the Applicant's supporting documents. As I indicated to the Applicant, this interview was done to establish whether he met the definition of "Entrepreneur", as defined in paragraph 88 of the *Immigration and Refugee Protection Regulations*, and which includes the necessary Business and management experience defined in the same paragraph. The three interviews for the related applicants were held separately with the assistance of the same Russian-English interpreter. This interpreter is the Program Assistant who had reviewed this and the other two applications submitted by the Applicant's alleged business partners, and is well-experienced in both the review of Entrepreneur class applications and translation for a variety of immigration applications.
> …
> 10. Despite having been informed of my concerns, the Applicant never raised any concern or provided comment regarding the translation provided by my Program Assistant. Should such concerns be raised by an applicant during an interview, a note regarding these concerns would be indicated in the CAIPS record.
> …

[13] Neither the Applicant nor the Visa Officer was cross-examined on his affidavit. The onus lies with an applicant for a permanent resident visa to Canada and on an application for judicial review such as this and not on the Respondent.

[14] In *Mohammadian v. Canada (Minister of Citizenship and Immigration)*[6], Justice Pelletier, then of the predecessor to this Court, wrote at paragraphs [29]:

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[6] [2000] 3 F.C. 371; appeal dismissed: 2001 FCA 191.

> In this case, I find that the question of the quality of the interpretation should have been raised before the CRDD because it was obvious to the applicant that there were problems between him and the interpreter. His affidavit refers to the difficulty he had understanding the interpreter and says that at times he did not understand what was being said. This is sufficient to require him to speak out at the time. His failure to do so then is fatal to his claim now. The applicant's assertion that he did not know he could object to the interpreter is not credible given that the first hearing was adjourned because he and the interpreter could not communicate. Clearly, the CRDD had shown it was alive to the issue of interpretation. As a result, I do not have to engage in an analysis as to whether all of the elements of *Tran* have been met since, even if they have, the applicant's failure to make a timely complaint in circumstances where it was reasonable to expect him to do so means that relief is not available to him.

[15] By analogy, the same might be said here.

[16] In the absence of cross-examination of the Visa Officer which might have cast doubt on the Visa Officer's sworn assertion that the Applicant never raised any concern or provided comment regarding the translation or interpretation provided at interview, the Applicant has simply failed to meet the burden on him to establish his assertion that there was a breach of procedural fairness in the conduct of the interview of him and his wife in their application for permanent resident status in Canada.

c) The determination by the Officer that the Applicant was not an "entrepreneur" as defined because the Applicant did not satisfy him that he had "business experience" because he did not manage a "qualifying business".

[17] To qualify as a member of the entrepreneur class, by subsection 97(1) of the *Regulations*, an applicant must be an entrepreneur within the meaning of subsection 88(1) of the *Regulations*. "Entrepreneur" is defined in subsection 88(1) of the *Regulations* as a foreign national who, among

other things, has "business experience". "Business experience" is defined in the same subsection of the *Regulations* as meaning a minimum of two years of experience consisting of two one-year periods of experience in the management of a qualifying business. By subsection 97(2) of the *Regulations*, if an individual such as the Applicant who makes an application as a member of the entrepreneur class is not an entrepreneur within the meaning of subsection 88(1) of the *Regulations*, his or her application must be refused and no further assessment is required.

[18] As noted earlier in these reasons, the Applicant, in his affidavit filed on this judicial review, attests that, at the time of the decision under review, he had management and control of a percentage of the equity in three (3) corporations. Although, by having management and control of a percentage of the equity in three (3) corporations, the Applicant fulfilled one (1) of the criteria to quality as an entrepreneur, he was required to fulfill all of the criteria. Nowhere does he attest that he had management and control of any of those businesses or, indeed, of any other business.

[19] At pages 40, 42 and 43 of the Tribunal Record before the Court, there appear "Calculation[s] of Business Experience" for the Applicant in respect of each of the businesses over which the Applicant attests that he had management and control of a percentage of the equity. In each case, over a relevant five (5) year period, the determination made in accordance with the *Regulations* is that the Applicant did not have two (2) years of experience consisting of two one-year periods of experience in the management of a qualifying business.

[20] Given the Applicant's failure to attest to the contrary, I am satisfied that the Officer's determination that the Applicant did not come within the meaning of "entrepreneur" because he had failed to satisfy the Officer that he had "business experience" because he did not manage a "qualifying business", was entirely open to him. Whether any of the businesses at issue was or was not a "qualifying business" is entirely irrelevant in the circumstances. The absence of sufficient "experience" in management of any business is determinative.

CONCLUSION

[21] For the foregoing reasons, I am satisfied that subsection 97(2) of the *Regulations* here applies. For ease of reference, that brief subsection is quoted again here.

97. … (2) If a foreign national who makes an application as a member of the entrepreneur class is not an entrepreneur within the meaning of subsection 88(1), the application shall be refused and no further assessment is required.	97. … (2) Si le demandeur au titre de la catégorie des entrepreneurs n'est pas un entrepreneur au sens du paragraphe 88(1), l'agent met fin à l'examen de la demande et la rejette.

In the result, this application for judicial review will be dismissed.

CERTIFICATION OF A QUESTION

[22] At the close of the hearing of this matter, counsel for the Respondent, when consulted, indicated that she would not propose a question for certification. Counsel for the Applicant urged that regard should be had for the determination on an application for judicial review of a negative decision regarding landing of a "business partner" of the Applicant which, at the time this matter was heard, was under reserve. I have since had an opportunity to consult with the judge who heard

that other matter and I am assured that it will be determined on a basis different from the basis on which I am determining this matter. In the result, I am satisfied that any question that might be certified in respect of that matter would not be determinative of this matter.

[23] I am satisfied that the determination of this matter turns on its unique facts. Put another way, no serious question of general importance that would be determinative on an appeal in this matter here arises. In the result, no question will be certified.

"Frederick E. Gibson"
JUDGE

Ottawa, Ontario.
April 29, 2008

ANNEX 1

Immigration and Refugee Protection Act - Subsection 12(2) of the Immigration and Refugee Protection Act, subsection 88(1) of the Regulations and subsections put a row of dots 97(1) and (2) of the Immigration and Refugee Protection Regulations.

Immigration and Refugee Protection Act

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.

Immigration and Refugee Protection Regulations

88. (1) The definitions in this subsection apply in this Division. …	**88.** (1) Les définitions qui suivent s'appliquent à la présente section. …
"business experience" , in respect of	«expérience dans l'exploitation d'une entreprise»:
… (*b*) an entrepreneur, other than an entrepreneur selected by a province, means a minimum of two years of experience consisting of two one-year periods of experience in the management of a qualifying business and the control of a percentage of equity of the qualifying business during the period beginning five years before the date of application for a permanent resident visa and ending on the day a determination is made in respect of the application; and …	… *b*) s'agissant d'un entrepreneur, autre qu'un entrepreneur sélectionné par une province, s'entend de l'expérience d'une durée d'au moins deux ans composée de deux périodes d'un an d'expérience dans la gestion d'une entreprise admissible et le contrôle d'un pourcentage des capitaux propres de celle-ci au cours de la période commençant cinq ans avant la date où la demande de visa de résident permanent est faite et prenant fin à la date où il est statué sur celle-ci; …
"entrepreneur" means a foreign national who (*a*) has business experience; (*b*) has a legally obtained minimum net worth; and (*c*) provides a written statement to an officer that they intend and will be able to meet the conditions referred to in subsections 98(1) to (5). …	«entrepreneur» Étranger qui, à la fois : *a*) a de l'expérience dans l'exploitation d'une entreprise; *b*) a l'avoir net minimal et l'a obtenu licitement; *c*) fournit à un agent une déclaration écrite portant qu'il a l'intention et est en mesure de remplir les conditions visées aux paragraphes 98(1) à (5). …

97. (1) For the purposes of subsection 12(2) of the Act, the entrepreneur 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 entrepreneurs within the meaning of subsection 88(1).

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

97. (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des entrepreneurs 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 entrepreneurs au sens du paragraphe 88(1).

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

ANNEX 2

[11] Les parties sont en désaccord en ce qui concerne la norme de contrôle applicable. Alors que le demandeur prétend qu'il s'agit d'une question mixte de fait et de droit nécessitant l'application de la norme raisonnable *simpliciter*, le défendeur soutient plutôt que la décision de l'agente de visa devrait être révisée seulement si elle est manifestement déraisonnable.

[12] Ce que l'agente de visa devait déterminer dans le cadre du présent dossier, c'était l'admissibilité de la demanderesse au vu du dossier et de la preuve qui étaient devant elle. C'est là, me semble-t-il, une question purement factuelle dans la détermination de laquelle cette Cour ne devrait pas intervenir à moins qu'il puisse être démontré qu'elle s'appuie sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont elle disposait *Loi sur les Cours fédérales*, L.R.C. 1985, c. F-7, art. 18.1(4)(d)).

[13] Il est vrai que dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9 [*Dunsmuir*], le plus haut tribunal a écarté la distinction entre la norme du raisonnable et celle du manifestement déraisonnable au motif que la distinction entre les deux concepts était difficilement applicable et somme toute illusoire. Ce faisant, la Cour a bien pris soin de noter que la norme de la raisonnabilité est empreinte de déférence à l'égard du législateur, et qu'elle commande « le respect de la volonté du législateur de s'en remettre, pour certaines choses, à des décideurs administratifs, de même que des raisonnements et des décisions fondés sur une expertise et une expérience dans un domaine particulier, ainsi que de la différence entre les

fonctions d'une cour de justice et celles d'un organisme administratif dans le système constitutionnel canadien » (au para. 49). Par conséquent, les tribunaux devront se garder d'intervenir lorsque la décision attaquée constitue l'une des « issues possibles acceptables pouvant se justifier au regard des faits et du droit » (au para. 47).

[14] Il en va autrement, bien entendu, en ce qui concerne la question relative à l'équité procédurale. En cette matière, il ne saurait être question d'appliquer l'analyse pragmatique et fonctionnelle; l'agente de visa n'avait pas droit à l'erreur, et se devait de respecter les exigences découlant des principes de justice naturelle et d'équité.

FEDERAL COURT

SOLICITORS OF RECORD

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