Federal Court  Cour fédérale

**Date: 20141031**

**Docket: IMM-3069-13**

**Citation: 2014 FC 1031**

**Ottawa, Ontario, October 31, 2014**

**PRESENT: The Honourable Mr. Justice de Montigny**

**BETWEEN:**

**GURTEJ SINGH SANDHU**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] This is an application for judicial review made pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) of a decision of a visa officer (the Officer) of the High Commission of Canada in New Delhi, refusing Gurtej Singh Sandhu's (the Applicant) application for permanent residence as a member of the investor class. The decision is dated March 25, 2013.

[2] For the reasons set out below, I find that this application for judicial review ought to be dismissed.

## I. Facts

[3] The Applicant is a citizen of India. His wife, son and daughter have been included in the application as family members.

[4] The Applicant claims to have been involved in the agricultural business since 1993. He alleges to have started a partnership, M/s Sandhu Friends Co., in 1999 with three other partners. In 2000, he asserts that he started another individual agricultural business, and alleges to have been involved in all areas of this business, from operations to marketing.

[5] The Applicant submitted his application for permanent residence in January 2011. On May 17, 2011, the Respondent requested additional documents, which the Applicant provided in June 2011.

[6] On March 25, 2013, the Officer rejected the application on the grounds that the Applicant did not prove that he had the business experience required under subsection 88(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*IRPR*) and therefore did not qualify as an investor under subsection 90(1) of the *IRPR*.

[7] On April 26, 2013, the Applicant filed an Application for Leave and Judicial Review of the Officer's decision.

## II. Decision under review

[8] The letter dated March 25, 2013 sent by the Officer to the Applicant indicated that the application for permanent residence was refused on the basis that the Applicant had not proven he had the business experience required under paragraph 88(1)(a) of the *IRPR*. The Officer noted that the Applicant did not meet the definition of "business experience" since he did not submit evidence of experience in the management of a qualifying business or satisfactory evidence of at least five full-time job equivalents. The Officer also found that the financial statements submitted were not reliable.

[9] Consequently, the Applicant could not be defined as an "investor" under subsection 90(1) of the *IRPR* and could not fall under the application of subsection 12(2) of the *IRPA* to obtain his permanent residence.

[10] The Computer Assisted Immigration Processing System (CAIPS) notes further add that the financial statements provided by the Applicant had not been audited and that the evidence of full-time equivalent was not satisfactory.

[11] The CAIPS notes underline that further documentation had been requested from the Applicant on May 17, 2011 but that the Applicant had not provided any such documentation.

## III. Issues

[12] The present application turns on the following two main questions:

A. Did the Officer err in denying the Applicant's application on the basis that he did not qualify as an investor?

B. Did the Officer breach procedural fairness by not giving the Applicant an opportunity to address the credibility concerns?

## IV. Standard of review

[13] Both parties submit, and I agree, that the applicable standard of review to the first question is reasonableness. An officer has broad discretion in assessing an application, and the Court must show deference towards the exercise of such discretion: *Hao v Canada (Minister of Citizenship and Immigration)*, 184 FTR 246 at para 7, [2000] FCJ No 296; *Wang v Canada (Minister of Citizenship and Immigration)*, 190 FTR 142 at para 13, [2000] FCJ No 677; *Liu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1025 at paras 7-8, [2006] FCJ No1289 [*Liu*]; *Nissab v Canada (Minister of Citizenship and Immigration)*, 2008 FC 25 at para 6, [2008] FCJ No 57 [*Nissab*].

[14] As for the second question, it is trite law that correctness applies to issues of procedural fairness: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339; *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100, [2003] 1 SCR 539.

## V. The statutory scheme

[15] The Applicant submitted an application for permanent resident status in Canada as part of the investor class. The eligibility criteria for this class can be found at subsection 12(2) of the *IRPA*:

| | |
|---|---|
| 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. |

The relevant sections of the *IRPR* provide as follows:

| | |
|---|---|
| Definitions | Définitions |
| 88. (1) The definitions in this subsection apply in this Division.<br>[…]<br>"business experience", in respect of | 88. (1) Les définitions qui suivent s'appliquent à la présente section.<br>[…]<br>« expérience dans l'exploitation d'une enterprise » : |
| (a) an investor, other than an investor selected by a province, means a minimum of two years of experience consisting of | *a)* S'agissant d'un investisseur, autre qu'un investisseur sélectionné par une province, s'entend de l'expérience d'une durée d'au moins deux ans composée : |
| (i) two one-year periods of experience in the management of a qualifying business and the control of a percentage of | (i) soit de deux périodes d'un an d'expérience dans la gestion d'une entreprise admissible et le contrôle d'un pourcentage des |

| | |
|---|---|
| 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, | 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, |
| (ii) two one-year periods of experience in the management of at least five full-time job equivalents per year in a 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, or | (ii) soit de deux périodes d'un an d'expérience dans la direction de personnes exécutant au moins cinq équivalents d'emploi à temps plein par an dans une entreprise 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, |
| (iii) a combination of a one-year period of experience described in subparagraph (i) and a one-year period of experience described in subparagraph (ii); | (iii) soit d'un an d'expérience au titre du sous-alinéa (i) et d'un an d'expérience au titre du sous-alinéa (ii); |
| […] | […] |
| "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 $1,600,000; and | *b)* a un avoir net d'au moins 1 600 000 $, 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. |

[…]
"qualifying business" means a business — other than a business operated primarily for the purpose of deriving investment income such as interest, dividends or capital gains — for which, during the year under consideration, there is documentary evidence of any two of the following:

(a) the percentage of equity multiplied by the number of full time job equivalents is equal to or greater than two full-time job equivalents per year;

(b) the percentage of equity multiplied by the total annual sales is equal to or greater than $500,000;

(c) the percentage of equity multiplied by the net income in the year is equal to or greater than $50,000; and

(d) the percentage of equity multiplied by the net assets at the end of the year is equal to or greater than $125,000.

[…]
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

[…]
« entreprise admissible » Toute entreprise — autre qu'une entreprise exploitée principalement dans le but de retirer un revenu de placement, tels des intérêts, des dividendes ou des gains en capitaux — à l'égard de laquelle il existe une preuve documentaire établissant que, au cours de l'année en cause, elle satisfaisait à deux des critères suivants :

*a)* le pourcentage des capitaux propres, multiplié par le nombre d'équivalents d'emploi à temps plein, est égal ou supérieur à deux équivalents d'emploi à temps plein par an;

*b)* le pourcentage des capitaux propres, multiplié par le chiffre d'affaires annuel, est égal ou supérieur à 500 000 $;

*c)* le pourcentage des capitaux propres, multiplié par le revenu net annuel, est égal ou supérieur à 50 000 $;

*d)* le pourcentage des capitaux propres, multiplié par l'actif net à la fin de l'année, est égal ou supérieur à 125 000 $.

[…]
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

| | |
|---|---|
| residents on the basis of their ability to become economically established in Canada and who are investors within the meaning of subsection 88(1). | 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). |
| Minimal requirements<br>(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. | Exigences minimales<br>(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. |

## VI. Analysis

A. *Did the Officer err in denying the Applicant's application on the basis that he did not qualify as an investor?*

[16] It is well established that the onus is on an applicant to establish, with sufficient evidence, that he or she meets the requirements of the class under which the application is made: *Nissab*, at para 6; *Liu*, at para 9.

[17] The burden the Applicant had to meet in order for his permanent resident visa application to be granted is clearly set out in the legislation. The Applicant, who was assisted by an immigration consultant, was aware that he had to establish that he had the relevant "business experience" and that he "owned a qualifying business", since he applied as an immigrant under the investor class.

[18] The Officer found that the Applicant did not fulfill either requirement set out in subparagraphs 88(1)(a)(i) and 88(1)(a)(ii) of the "business experience" definition, as he had not provided satisfactory evidence of management experience (subparagraph (i)) or evidence of full-time equivalent jobs (subparagraph (ii)).

[19] The Applicant did not object to the Officer's general conclusions regarding his business experience, and in particular, to the conclusion that "[e]vidence of FTEs [full-time equivalents] is also not satisfactory". The Applicant focused instead on the Officer's conclusion that his financial statements were not reliable. His argument is that requiring him to supply audited financial statements goes beyond the requirements under the *IRPA* and the *IRPR*.

[20] There is nothing in the *IRPA* or in the *IRPR* that provides information as to the nature of acceptable financial statements. One has to go to the OP9 Manual (Overseas Processing Investors Manual) to find that information. Section 11.1 of that Manual indicates what documents are acceptable in analyzing and assessing business experience:

> **11.1. Reviewing specific documentation**
>
> Officers should begin their assessment by examining documentation submitted by the applicant to determine the applicant's business experience. Relevant documents include:
>
> Business Immigration Application Form
>
> • personal net worth statement
>
> • business balance sheet
>
> • corporate employee payroll (list)
>
> These documents provide an accounting of the applicant's assets and liabilities and help the officer to determine whether the applicant has the required business experience.

[21] As for the nature of acceptable financial statements, section 11.2 provides that officers must "carefully consider the integrity of the financial statements provided". It goes on to state that in Canada, there are essentially three types of documents that a public accountant can provide: audits, review engagements and compilation engagements. It then adds the following:

> The majority of small companies or companies which do not have to report to a bank or other creditors will just get a compilation when they get their tax returns professionally prepared.
>
> Most countries have a similar range of reporting engagements. In particular, if there has been a British influence in the past (i.e., Hong Kong), the standards will be very close to ours.
>
> When the veracity of the documentation is in doubt, the officer should:
>
> > •First request further documentation. In the absence of suspicious circumstances, it will ordinarily be appropriate to accept financial statements which have been reported on by a reputable external accountant. Most small businesses are extremely unlikely to have been audited.
> >
> > […]
> >
> > •Officers should review other supporting documentation as necessary. This documentation may include […]

[22] While the Applicant does not provide submissions as to the size of his business, it is a fair assumption that it is a small business. According to the charts provided with his additional documents, 11 employees or less have been working in the relevant businesses (farming business and commission agents business) from the year 2006-2007 to the year 2010-2011. It can also be seen in these charts that the net income of these two businesses was in the amount of CDN $24,326 for the year 2010-2011. It is therefore to be assumed that such a small company had not been audited.

[23] This is not to say, however, that an officer may not ask for audited financial statements if there is any doubt as to the genuineness of the documentation provided. It is the responsibility of the Officer to ensure the reliability and accuracy of the information provided in the financial statements of an applicant in order to ensure that no error in the administration of the *IRPA* takes place and that all the requirements of the *IRPA* and the *IRPR* are met. Since the documentation presented by the Applicant in his application were considered insufficient to establish the minimum statutory requirements, the Officer requested, in the May 2011 letter, audited financial statements, a copy of the professional license of the chartered accountants firm which prepared the financial statements, payroll or other documents clearly indicating the number of employees and their level of remuneration and other documents.

[24] The Applicant failed to produce the requested documents, and did not provide an explanation for failing to do so. In those circumstances, the Officer was clearly entitled to find that the Applicant did not meet the requirements of the *IRPA* and of the *IRPR*. The Officer was not obliged to blindly accept whatever documents the Applicant chose to provide in support of his application, and he was clearly empowered to request audited financial statements to verify the validity, accuracy and authenticity of the documents provided by the Applicant. As noted by counsel for the Respondent, there are significant variances in the sales and net profit of his business, no deeds for his residential property or agricultural lands were provided, affidavits from the employees do not state how many hours they worked or how much they were paid, and bank records do not identify the owner of the accounts. In those circumstances, the Officer could legitimately have some concerns with the documentation filed by the Applicant. It would

obviously have been preferable if the Officer had spelled out his concerns more explicitly, but the duty to give reasons is at the low end of the spectrum in the context of visa applications.

[25] For all of these reasons, I am of the view that the Officer's decision is reasonable.

B. *Did the Officer breach procedural fairness by not giving the Applicant an opportunity to address the credibility concerns?*

[26] The Applicant also submitted that he was not provided an opportunity to address the Officer's credibility concerns, which amounts to a breach of procedural fairness. In my view, this argument is without merit.

[27] I agree with the Respondent that a careful review of the reasons clearly demonstrates that no credibility findings were made. The application was refused because the Applicant failed to provide sufficient evidence that he met the statutory requirements to be considered under the investor class, and in particular that he has "business experience". The Officer requested that the Applicant provide specific further documents to demonstrate that he met the statutory requirements, yet the Applicant failed to comply with that request without giving any explanation as to why he could not file these documents.

[28] The duty of an officer to provide an applicant with the opportunity to address his or her concerns about credibility issues has been discussed in numerous cases from this Court. It is now abundantly clear that a visa officer is not obliged to provide an applicant with the opportunity to respond to concerns that arise directly from the *IRPA* and the *IRPR*: see, for example, *Hassani v*

*Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at para 24, [2007] 3 FCR 501; *Liu*, at para 16; *Zhou v Canada (Minister of Citizenship and Immigration)*, 2013 FC 465 at para 28, 17 Imm LR (4th) 298.

## VII. Conclusion

[29] For the above reasons, this application for judicial review must be dismissed. The Officer could reasonably conclude that the Applicant had not provided sufficient evidence to prove he had the required business experience, and he was under no duty to provide the Applicant with an opportunity to address his concerns. No question for certification was proposed by the parties, and none will be certified.

## JUDGMENT

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed.

No question for certification was proposed by the parties, and none will be certified.

"Yves de Montigny"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-3069-13 |
| **STYLE OF CAUSE:** | GURTEJ SINGH SANDHU v THE MINISTER OF CITIZENSHP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | JULY 9, 2014 |
| **JUDGMENT AND REASONS:** | DE MONTIGNY J. |
| **DATED:** | OCTOBER 31, 2014 |

**APPEARANCES:**

| | |
|---|---|
| Wennie Lee | FOR THE APPLICANT |
| Ildikó Erdei | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Lee & Company<br>Barristers and Solicitors<br>Toronto, Ontario | FOR THE APPLICANT |
| William F. Pentney<br>Deputy Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |