Federal Court  Cour fédérale

Date: 20151217

Docket: IMM-2412-15

Citation: 2015 FC 1393

Ottawa, Ontario, December 17, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

BAHRAM MOHITIAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is a 53 year old citizen of Iran. He and his wife, age 43, have a daughter and a son who are, respectively, 19 and 14 years old. Since 2007, the Applicant has been self-employed at the Hassam Mohitian Silver Gallery in Tehran, where he has a 50 percent ownership interest and works as a manager. He also has a 50 percent ownership interest in a citrus orchard in Chalous, Iran, and since 1996 has been the owner and manager of a walnut orchard in Karaj,

Iran. The Applicant's interests in these businesses are valued at approximately CDN $1,177,120, and he owns other property worth approximately CDN $1,036,000.

[2] In August 2007, the Applicant and his wife visited Canada for a month, travelling to Vancouver and Saskatchewan. After his trip to Canada, the Applicant applied in November 2007 for permanent residence in Canada in the self-employed category, intending to purchase an existing farm in Saskatchewan. His application for a permanent resident visa then languished for nearly seven years until an immigration officer at the Canadian Embassy in Ankara, Turkey, in a letter dated February 6, 2015, requested updated immigration forms and numerous other documents. The Applicant's consultant forwarded the requested documentation to the immigration section at the Embassy in a letter dated March 8, 2015. However, in a letter dated March 30, 2015, an officer at the Embassy [the Officer] denied the Applicant's application for permanent residence in Canada as a self-employed person. The Applicant now applies for judicial review of the Officer's decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*], asking the Court to set the decision aside and return the matter for re-determination by a different officer.

II. The Officer's Decision

[3] The Officer's refusal letter stated that he was not satisfied the Applicant met the definition of "self-employed person" pursuant to subsection 88(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*], and also that the Applicant had provided insufficient detail about his proposed self-employment in Canada. In the Officer's view, the Applicant did not provide evidence of research regarding the cost of farmland and

accommodations in Saskatchewan, the cost of supplies, salary and income expectations, or the feasibility of the proposed farm, such that the Applicant failed to establish his intent to become self-employed and make a significant economic contribution to Canada. The Officer also stated in the decision letter that he was "not satisfied" the Applicant met the "test of relevant experience." In the Officer's estimation, the readily available funds to be transferred to Canada were low, and thus the Officer was not satisfied the Applicant could create an employment opportunity for himself, maintain himself and his family, and make a significant contribution to Canadian society. The Officer further stated in the refusal letter that the Applicant had not "presented a realistic business plan nor that you have demonstrated appropriate experience and appropriate skills" to become a self-employed farmer in Canada.

[4] In the Global Case Management System [GCMS] notes, the Officer noted that the Applicant had visited Saskatchewan in 2007, and had identified hazelnuts, Siberian crab apples, and blueberries as possible crops. The Officer also noted that the Applicant was self-employed and had provided proof of ownership of his orchards and an explanation of the tasks he undertakes, concluding that: "I am satisfied that PA meets the test of relevant experience." The Officer further noted that the Applicant identified a net worth of $2,222,957 CDN and settlement funds of $800,000 CDN. The Officer stated that, while the Applicant indicated he would sell assets to generate funds, his "immediate readily available funds are somewhat low, less than $25,000 CAD."

[5] The Officer also stated in the GCMS notes that "little details [sic]" had been provided about the Applicant's planned self-employment activities, noting that other than evidence of

having ordered a brochure from the province of Saskatchewan about products growing there, there were "little details and sufficient supporting documents on file" to establish the feasibility of the Applicant's proposed farming activities.

III. Mr. Milic's Affidavit

[6] Subsequent to the Officer's decision and after filing of the Respondent's memorandum of fact and law on August 7, 2015, Tony Milic, a First Secretary with Citizenship and Immigration Canada, swore an affidavit dated October 5, 2015, concerning a discrepancy between the Officer's decision letter dated March 30, 2015, and the GCMS notes. First, Mr. Milic states that the decision letter should have read that the Officer *was* satisfied that the Applicant met the test of relevant experience, rather than *not* satisfied. Second, he states that the phrase, "nor have you demonstrated appropriate experience and appropriate skills," should have been entirely omitted from the third to last paragraph of the decision letter; this phrase appears in this sentence: "I am not satisfied that you have presented a realistic business plan *nor that you have demonstrated appropriate experience and appropriate skills* which would show your ability to become a self-employed farmer in Canada [italics added]." The questions raised by this affidavit will be addressed shortly below.

IV. Issues

[7] This application for judicial review raises the following issues:

1. Should Mr. Milic's affidavit be accepted as evidence for purposes of this judicial review application?

2. Did the Officer make unreasonable findings of fact in determining that the Applicant did not qualify for permanent residence in the self-employed category?

3. Was the Applicant denied procedural fairness by the Officer not affording the Applicant an opportunity to address the Officer's concerns about his intent and ability to become self-employed in Canada?

V. Analysis

A. *Should Mr. Milic's affidavit be accepted as evidence for purposes of this judicial review application?*

[8] As a general rule, the record for judicial review is usually limited to that which was before the decision-maker; otherwise, an application for judicial review would risk being transformed into a trial on the merits, when a judicial review is actually about assessing whether the administrative action was lawful (see: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 14-20, 428 NR 297 [*Association of Universities*], cited in *Gaudet v Canada (Attorney General)*, 2013 FCA 254 at para 4, [2013] FCJ No 1189 (QL); also see: *Bernard v. Canada (National Revenue)*, 2015 FCA 263 at paras 13-28, [2015] FCJ No 1396). There are a few recognized exceptions to the general rule against the Court receiving evidence which was not before the decision-maker in an application for judicial review, "and the list of exceptions may not be closed" (see: *Association of Universities* at para 20). Does the Milic affidavit fall within one of these exceptions as noted in *Association of Universities*?

[9] Affidavits are sometimes necessary to bring to the Court's attention procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural fairness. I do not see the Milic affidavit being one which falls within this exception. On the contrary, this affidavit concerns the wording of the very decision itself under review. It does not offer evidence as to whether the decision under review was rendered in a procedurally unfair manner.

[10] Other times an affidavit is received on judicial review in order to highlight a complete absence of evidence before the decision-maker when it made a particular finding. Again, I do not see the Milic affidavit as one falling within this exception. The certified tribunal record in this matter exceeds 500 pages, so there was substantial evidence before the Officer upon which he could make his findings.

[11] In addition, the Court will sometimes accept an affidavit that provides general background in circumstances where such information might assist it in understanding the issues relevant to the judicial review; in this regard, the Federal Court of Appeal has cautioned that: "Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider" (*Association of Universities* at para 20). Again, I do not see the Milic affidavit as one falling within the established exceptions to the general rule noted above.

[12] The affidavit of Mr. Milic raises a peculiar situation inasmuch as it purports to rectify and correct certain alleged typographical errors in the refusal letter. It is true that the GMCS notes state the Officer's conclusion on March 25, 2015 that: "I am satisfied that PA meets the test of relevant experience." Yet, some five days later in the refusal letter dated March 30, 2015, the Officer (assuming it was even the same one) wrote: "I am not satisfied that PA meets the test of relevant experience." Although typing the words *I am not* in the refusal letter rather than *I am* could very well be a typographical error, it is possible that, despite Mr. Milic's confirmation in his affidavit that the GMCS notes in this matter "are true and accurate," they may not be so even if his affidavit is accepted as evidence. Indeed, how Mr. Milic can offer any confirmation at all in this regard is questionable, to say the least, because he clearly was not the author of such notes.

[13] In my view, Mr. Milic's affidavit raises more questions than it answers about the decision under review and, consequently, should be rejected as evidence for purposes of this judicial review application. It is clear from his affidavit that Mr. Milic is not the Officer who entered the GMCS notes and also is not the Officer who issued the refusal letter (which letter, incidentally, is not signed by anyone). Mr. Milic also states he has been informed, but not by whom, that the Applicant "did not have the requisite intent or ability to become self-employed in Canada, and therefore the application was refused." It is trite law that in an affidavit the affiant is required to identify the source of their information if it is not through their own knowledge and belief.

[14] Earlier in his affidavit (at paragraph 4) Mr. Milic also refers to Mr. Mohitian's "application for a permanent resident visa as *a member of the skilled worker* [class]" (emphasis added), which is clearly incorrect. Furthermore, it is one thing to suggest, as the Respondent did

at the hearing of this matter, that a missing word is a mere typographical error and should be corrected by acceptance of Mr. Milic's affidavit. It is quite another, however, to accept Mr. Milic's affidavit wherein it is requested that an entire phrase should be omitted from the refusal letter. If anything, this points to the unreasonableness of the Officer's decision, the issue to which I now turn.

B. *Did the Officer make unreasonable findings of fact in determining that the Applicant did not qualify for permanent residence in the self-employed category?*

[15] The short answer to the above question is, yes.

[16] It was contradictory for the Officer to state in the GCMS notes that, "I am satisfied that PA meets the test of relevant experience," and then to state in the decision letter, "I am not satisfied that you meet the test of relevant experience nor have you demonstrated appropriate experience and appropriate skills." This is unintelligible and, hence, unreasonable.

[17] This contradiction on the face of the record suggests the Officer did not properly direct his mind to the evidence, having considered it once on March 25th and found that the Applicant met the test of relevant experience, and then five days later when writing the decision letter on March 30th apparently forgetting this conclusion. On this basis alone, therefore, the decision is unreasonable and the matter must be returned for reconsideration by another officer.

C. *Was the Applicant denied procedural fairness by the Officer not affording the Applicant an opportunity to address the Officer's concerns about his intent and ability to become self-employed in Canada?*

[18] The Officer found that the Applicant had not presented "a realistic business plan." This finding, however, was made without any input or information from the Applicant other than that which he had submitted with his application in November 2007 and in March 2015 in response to the Embassy's request for updated forms and documents in its letter of February 6, 2015. This February 2015 letter contained a detailed, two page checklist as to what forms and other documentation the Applicant should submit; it also advised that where a requested document was unavailable a written explanation with full details should be provided. This letter did not request or advise that the Applicant should submit a business plan.

[19] Section 5.5 of the Overseas Processing Manual (OP-8), Entrepreneur and Self-Employed (2008-08-07) [the Manual], states that members of the business immigrant class may or may not be called to an interview. The Applicant was not interviewed; this differentiates this case from many of the cases where this Court has upheld an officer's decision to refuse permanent residence as a member of the self-employed class, due to concerns about business plans (see: e.g., *Sahota v Canada (Minister of Citizenship and Immigration)*, 2005 FC 856, [2005] FCJ No 1074).

[20] At the hearing of this matter, the Applicant did not submit that the circumstances of this case required the Officer to convoke an interview to address his specific concerns about the Applicant's business plan. He did, however, submit that in the circumstances of this case,

procedural fairness dictated that the Applicant should have been afforded an opportunity to disabuse the Officer of his concerns as to whether the Applicant's business plan was realistic.

[21] There is, of course, no requirement in the *Act* or the *Regulations* for an applicant who applies for permanent residence in the self-employed class to submit a formal business plan (see, e.g.: *Guryeva v. Canada (Citizenship and Immigration)*, 2015 FC 1103 at para 16, 258 ACWS (3d) 395; also see *Kameli v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 772 at para 19, 115 ACWS (3d) 1044). In this regard, it deserves note that section 11.7 of the Manual states that:

> Officers may request that self-employed applicants show evidence of having researched the Canadian labour market and adopted a realistic plan that would reasonably be expected to lead to self-employment.
>
> However, a formal business plan that would entail unnecessary expense and administrative burden is discouraged.

[22] Furthermore, section 5.14 of the Manual provides the following guidance for officers:

> When the officer has concerns about eligibility or admissibility, the applicant must be given a fair opportunity to correct or contradict those concerns. The applicant must be given an opportunity to rebut the content of any negative provincial assessment that may influence the final decision. The officer has an obligation to provide a thorough and fair assessment in compliance with the terms and spirit of the legislation and procedural fairness requirements.

[23] I agree with the Applicant 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.

Although an interview may not have been required, a simple procedural fairness letter informing the Applicant of the Officer's concerns in this regard should have been sent to the Applicant. This is all the more so in view of the lengthy period of time which had transpired in processing the Applicant's application and the relative promptness it was dealt with after the Applicant updated his documentation.

[24] Although not precisely on point, this Court's decision in *Yazdanian v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 411, 170 FTR 129 [*Yazdanian*], involving an Iranian farmer who sought permanent residence as a member of the entrepreneur class, highlights the principle upon which the Officer in this case erred by not affording the Applicant an opportunity to address the concerns about the Applicant's intent and ability to become self-employed in Canada. In *Yazdanian*, Madam Justice Tremblay-Lamer held as follows:

> [18] While I agree with the Respondent that the Applicant has the onus to provide sufficient information to the Visa Officer to support his application, when the Visa Officer has a specific concern that could impact negatively on the application, fairness requires that the Applicant be given an opportunity to respond to her concern. (emphasis in original)

VI. Conclusion

[25] In conclusion, the Officer's decision is unreasonable not only because it is unintelligible, but also because it was rendered in a procedurally unfair manner as the Applicant was not afforded an opportunity to disabuse the Officer of the concern as to whether the Applicant's business plan was realistic.

[26] Accordingly, the Officer's decision is set aside and the matter returned for reconsideration by another officer. Neither party suggested a question for certification, so no such question is certified. No costs are awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed and the matter is returned for re-determination by a different visa officer; no serious question of general importance is certified, and there is no award of costs.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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