

Federal Court



Cour fédérale

Date: 20170105

Docket: IMM-793-16

Citation: 2017 FC 16

Ottawa, Ontario, January 5, 2017

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ELIRAN MORDECHAI ELIYAHU LAZAR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Eliran Mordechai Eliyahu Lazar [the applicant or Mr. Lazar] is a citizen of Israel. In May 2014, he applied for permanent residence from within Canada under the Canadian Experience Class [CEC]. In support of his application, Mr. Lazar indicated that he was a senior manager with Gaya Cosmetic Industries Inc. [Gaya].

[2] In January 2016, Citizenship and Immigration Canada requested Mr. Lazar provide information relating to Gaya's business licence, its shareholder breakdown and its organizational chart. The information was provided and, approximately one month later, his application was refused. The refusal letter noted Mr. Lazar's ownership of Gaya's shares and that periods of self-employment are not eligible for calculating a period of work experience under the CEC. The Immigration Officer [Officer] determined that Mr. Lazar was self-employed and therefore did not meet the requirements of the CEC program. Mr. Lazar now seeks judicial review of the Officer's refusal decision. He submits that the Officer ignored evidence, rendered an unreasonable finding and breached the principles of procedural fairness. I disagree.

[3] The Officer reasonably addressed the evidence and the refusal was an acceptable outcome in light of the facts and the law. Similarly, I am not convinced that there was any breach of the duty of procedural fairness. For the reasons that follow, the application is dismissed.

II. Background

A. *The Application*

[4] In advancing his application under the CEC, Mr. Lazar indicated that he had the required work experience as a Senior Manager as classified under the National Occupational Classification (Code 0016).

[5] In support of his declared work experience, he indicated that he had been working in Canada since April 2012 and included two work permits covering the periods of April 2012 to

April 2013 and July 2013 to August 2015. The permits identified Gaya as the employer. He also included tax related documents and an employment letter confirming Gaya as his employer, setting out his hours of work and annual salary inclusive of bonuses. In completing the application, Mr. Lazar responded “no” to the question asking if he was self-employed.

[6] In response to a request to forward additional documentation Mr. Lazar provided the Articles of Incorporation for Gaya, the Shareholders’ Register and documentation identifying current directors and officers of Gaya. This information disclosed that Mr. Lazar was the President of Gaya and owner of ninety percent of Gaya’s shares.

B. *The Decision*

[7] In rendering the refusal decision, the Officer noted that, pursuant to section 87.1 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], applicants are assessed against the established experience criteria on a pass/fail basis.

[8] The Officer noted Mr. Lazar’s declared experience as a Senior Manager with Gaya and also noted that he was a ninety percent owner of the company. The Officer then noted that “any period of self-employment or unauthorized work shall not be included in calculating a period of work experience” in accordance with subsection 87.1(3)(b) of the IRPR. The Officer concluded that Mr. Lazar was self-employed and as such, did not meet the requirements of the CEC program. The application was refused.

III. Standard of Review

[9] The Officer's determination that Mr. Lazar was self-employed and did not possess the requisite skilled work experience under the CEC is a question of mixed fact and law to be reviewed on a reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at paras 51 and 53 and *Parssian v Canada (Minister of Citizenship and Immigration)*, 2016 FC 304 [*Parssian*] at para 17). When conducting a review on a reasonableness standard, this Court may intervene only where the Officer's decision-making process was not justified, transparent and intelligible and where the decision is outside the range of "... possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir* at para 47.)

[10] On the issue of procedural fairness, the parties agree that the standard of review is correctness (*Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 at para 43 and *Parssian* at para 17).

IV. Analysis

A. *Did the Officer Ignore Evidence?*

[11] Mr. Lazar argues that he provided significant evidence in support of the application demonstrating that he was in an employer/employee relationship with Gaya and that the evidence also demonstrated that Gaya was not solely owned by him. Despite this, the Officer relied on the Shareholders' Register to conclude that Mr. Lazar was self-employed. In reaching this conclusion, the Officer made no reference to other highly relevant documentary evidence,

including T4 slips and an employment letter - documentary evidence that is expressly referred to in the Operations Manual for CEC Applications [Operational Manual] as "... key documentary evidence for the vast majority of CEC applicants ...". He argues that the Officer also made no reference to his negative response to the application form question regarding self-employment.

[12] Mr. Lazar relies on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* [1998] FCJ No 1425 [*Cepeda-Gutierrez*] to argue that the Officer's silence with respect to directly relevant and contradictory evidence allows the Court to infer that the evidence was ignored and, in turn, to conclude that the decision is unreasonable. I am not convinced.

[13] While *Cepeda-Gutierrez* stands for the principle set out by Mr. Lazar, that principle is of little assistance in this matter.

[14] It is undisputed that the onus was on Mr. Lazar to establish that he met the CEC criteria. The criteria include work experience through employment by a third party. The Operational Manual Mr. Lazar makes reference to in his written submissions sets out factors to be considered in assessing whether an applicant is an employee or self-employed. The Operational Manual recognizes that this assessment can often be difficult when examining the employment of professionals and states that "... individuals who hold substantial ownership and/or exercise management control of a business for which they are also employed are generally considered to be self-employed." While, as noted above, the Operational Manual also notes that tax documentation is key documentary evidence in respect of the employment relationship in the vast majority of cases, the vast majority of cases does not equate to all cases.

[15] In the circumstances of this application, the Officer concluded that Mr. Lazar's ninety percent ownership in the company and his role as President of Gaya was determinative of the employee/employer question. In reaching this conclusion the Officer is presumed to have considered all of the evidence before him/her. Having concluded that Mr. Lazar's substantial ownership and management control were determinative of the question, the Officer was under no obligation to address the remaining documentary evidence.

B. *Is the Decision Unreasonable?*

[16] Mr. Lazar argues that the Officer improperly conflated ownership of shares and the question of self-employment. He argues that a shareholder who is also employed by a corporation is an employee of that corporation since it enjoys a separate legal status from its shareholders.

[17] While a corporation is, in law, a separate and distinct legal entity, the assessment of the question of self-employment under the CEC is driven by factors relating to ownership and control of a business. This is evident when one reviews the factors relating to an assessment of self-employment set out in the Operational Manual. The Operational Manual draws no distinction between businesses established as corporations, sole proprietorships or partnerships. Rather, the Operational Manual speaks of businesses generally and focuses on questions of ownership and control, not business structure.

[18] In this case, Mr. Lazar owns the vast majority of the shares in Gaya and he holds the position of President. It was reasonably open to the Officer to conclude, based on these

undisputed facts, that Mr. Lazar was self-employed for the purposes of assessing his application under the CEC. The decision is not unreasonable.

C. *Was there a Breached of the Principles of Procedural Fairness*

[19] Mr. Lazar argues that in light of the significant evidence provided supporting his employment relationship with Gaya and his statement in the application that he was not self-employed, the Officer was obligated to allow him to address self-employment concerns prior to rendering the decision. He further argues that the rejection of the evidence of an employer/employee relationship implicitly called into question the credibility of the evidence. He argues that the failure to provide an opportunity to respond amounted to a breach of procedural fairness. Again I disagree.

[20] The jurisprudence establishes that in the visa context: (1) an applicant has the onus of providing sufficient evidence to support the application; (2) the degree of procedural fairness owed to an applicant is at the low end of the spectrum; (3) there is no obligation on an Officer to notify an applicant of deficiencies in the application or supporting documentation; and (4) there is no obligation on the Officer to provide the applicant with an opportunity to address any concerns of the Officer when the supporting documents are incomplete, unclear or insufficient to satisfy the Officer that the applicant meets the requirements. (*Ansari v Canada (Minister of Citizenship and Immigration)*, 2013 FC 849 at para 23 referring to *Hamza v Canada (Minister of Citizenship and Immigration)*, 2013 FC 264).

[21] Concerns relating to credibility, the accuracy or the genuine nature of information submitted with an application often require that an applicant be given an opportunity to address these concerns (*Madadi v Canada (Citizenship and Immigration)*, 2013 FC 716 at para 6 citing *Perez Enriquez v Canada (Citizenship and Immigration)*, 2012 FC 1091 at para 26). However, this is not the situation in this case. The Officer had no concerns with Mr. Lazar's credibility or the genuine nature of the evidence provided. Rather, the Officer simply came to the conclusion that the evidence provided supported the conclusion that for immigration purposes, the applicant was self-employed based on his substantial ownership and control of Gaya, his employer. Unlike the situation in *Li v Canada (Minister of Citizenship and Immigration)*, 2012 FC 484 upon which Mr. Lazar relies, there was no ambiguity arising out of the evidence or the guidance provided. While Mr. Lazar does not agree with the decision, that disagreement does not render the decision unreasonable nor trigger an obligation to provide an opportunity to respond.

[22] The determinative issue was not related to credibility or concerns with the genuine nature of the information provided. There was no breach of procedural fairness.

V. Certified Question

[23] Counsel for Mr. Lazar has proposed the following question for certification:

Does being a majority shareholder in a corporation automatically render an individual that works for that same corporation self-employed for the purposes of Regulation 87.1(3)(b) of the *Immigration and Refugee Protection Regulations* SOR/2002-227?

[24] Mr. Lazar argues that the question is dispositive of the appeal and transcends the interests of the parties as it contemplates an issue of general importance. I am unable to agree. Mr. Lazar

has argued that the decision evidences that where a majority shareholder of a corporation works for that corporation, an applicant will automatically be determined to be self-employed. No such result is mandated by the legislation, regulations or manuals placed before the Court on this application. The decision in this case was based on an exercise of discretion by the Officer having considered the evidence and reaching a conclusion that was reasonably available on the evidence. The question posed is not dispositive of this application nor does it raise an issue of general importance. I decline to certify the proposed question.

VI. Conclusion

[25] The Officer's refusal decision was a reasonably available outcome. The application is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-793-16

STYLE OF CAUSE: ELIRAN MORDECHAI ELIYAHU LAZAR v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

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