

Federal Court



Cour fédérale

**Date: 20170630**

**Docket: IMM-5044-16**

**Citation: 2017 FC 640**

**Toronto, Ontario, June 30, 2017**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**THOMAS FRANCIS BYRNE**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] This is an application for judicial review of a decision by an Immigration Officer [the Officer] dated November 18, 2016, refusing the Applicant's application for permanent residence under the Canadian Experience Class [CEC]. The Officer was not satisfied that the Applicant met the skilled work experience requirement for the application, because the Officer concluded that the Applicant was self-employed.

[2] As explained in greater detail below, this application is dismissed, because the Applicant has not established that the Officer's decision was unreasonable or made in breach of obligations of procedural fairness.

## II. Background

[3] The Applicant, Mr. Thomas Francis Byrne, is a citizen of Ireland who applied for permanent residence under the CEC program. Mr. Byrne had previously been granted a work permit as "Owner/Operator" of 2338520 Ontario Inc. a.k.a. Dairy Queen Collingwood. His CEC application was based on his work experience with Dairy Queen Collingwood.

[4] Mr. Byrne's application was supported by a letter dated June 22, 2016 from Maurice Byrne, who is described as the CEO and Director of Dairy Queen Collingwood. The Applicant submits that Maurice Byrne is his brother. At the hearing of this application for judicial review, the Respondent took the position that there was no evidence before the Officer to establish this fact. As explained below in my analysis of the Applicant's procedural fairness argument, I do not consider this fact to be particularly relevant to the outcome of this judicial review. However, based on Irish birth certificates included in the Certified Tribunal Record, which show Thomas Byrne and Maurice Byrne as having a father of the same name and address, I accept the Applicant's submission that he and Maurice are brothers.

[5] Maurice Byrne's June 22, 2016 letter states that the Applicant has been an employee of Dairy Queen Collingwood since September 2012, the business having been acquired in 2012,

and that his present salary is \$60,000. The letter also states the following in relation to the Applicant's role in the company:

Since 2012, Thomas has been part of the management team reporting to the CEO of the company. The management team were responsible for the transition of the business to new ownership and to its day to day direction and management, throughout which time his role and responsibilities have adhered to the ultimate direction of the Dairy Queen Collingwood board of directors. As part of the management team, he has been responsible for hiring and training the Canadians employed by the business at that time. He has also been responsible for the execution of the management of other employees of the business, planning and directing all day to day operations, and managing budgets. Thomas' capacity as a senior manager means that he provides significant insight and input into the establishment and execution of job roles by individual employees; the direction of the corporation has the ultimate say in such organizational structure and his responsibilities and methods used for the execution of such fall within our classifications. At no time are full-time employees of the business permitted to engage in outside employment without prior permission.

[6] The Certified Tribunal Record, capturing the documentation that was before the Officer when the impugned decision was made, also includes an earlier letter dated September 23, 2015 from Maurice Byrne, then described as Director of Dairy Queen Collingwood, referring to the Applicant as the principal shareholder and owner/operator of this restaurant business. Consistent with the later letter of June 22, 2016, this letter states that the Applicant's responsibilities will include ongoing recruiting, training, and management of employees of the restaurant business, planning and directing all day-to-day operations, and managing budgets. This letter indicates that it was being submitted to Citizenship and Immigration Canada in support of the Applicant's application for extension of his work permit to engage in work as an Owner/Operator of Dairy Queen Collingwood.

[7] Mr. Byrne's application for permanent residence under the CEC class also provided T4 slips issued by Dairy Queen Collingwood, intended to confirm his status as an employee.

[8] The impugned decision is reflected in a letter to Mr. Byrne dated November 18, 2016 as well as notes in the Global Case Management System [GCMS]. The letter conveyed the Officer's determination that Mr. Byrne does not meet the requirements for immigration to Canada. It noted that his application was based on the following occupation which he identified as part of his skilled work experience in Canada: "SEP2012 – date of application: Owner/Operator – NOC 0631 – 2338520 Ontario Inc. a/o Dairy Queen Collingwood". The Officer was not satisfied that Mr. Byrne met the skilled work experience requirement, because the supporting documents provided by him confirmed that he has been a shareholder in the Dairy Queen Collingwood business during the relevant period of work. The Officer's letter referred to s. 87.1(3)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 as excluding any period of self-employment when calculating a period of qualifying work experience in Canada. The Officer therefore refused Mr. Byrne's application.

[9] In the GCMS notes, also dated November 18, 2016, the Officer noted that a search history indicated that Mr. Byrne's initial work permit was issued in 2012 as Owner/Operator of Dairy Queen Collingwood and that a letter on file from the company's Director, Maurice Byrne, confirmed that Mr. Byrne is the principal shareholder of the business.

[10] Earlier GCMS notes, dated August 18, 2016, demonstrate a Case Analyst preparing a recommendation on Mr. Byrne's application for review by an officer. The Analyst comments

that it appears the Applicant has ownership in the company based on the job title declared (Owner/Operator) and that the Director who signed the letter of offer has the same last name as the Applicant and could be his brother. The Analyst then notes that self-employment is not eligible for CEC and refers the matter for review by an officer.

### III. Issues and Standard of Review

[11] The Applicant submits the following issues for the Court's consideration:

- A. Was the Officer's interpretation of "self-employment" under the CEC application unreasonable?
- B. Was the Applicant denied procedural fairness in the processing of his application by failing to be notified of the Officer's credibility concerns?

[12] The Respondent also raises a preliminary issue, in that this application for judicial review is supported by an affidavit sworn by the Applicant which includes evidence that was not before the Officer. The Respondent takes the position that this evidence and any arguments derived therefrom should be struck or afforded no weight, such that the judicial review is restricted to the evidentiary record that was before the Officer. The Applicant responds that the new evidence is relevant to the procedural fairness issue. I will address this evidentiary issue below in my analysis of the procedural fairness arguments.

[13] The parties agree, and I concur, that the issue of whether or not the Officer made a reasonable decision is reviewable on a reasonableness standard, while the issue of procedural fairness is reviewable on a correctness standard (see *Lazar v Canada (Citizenship and Immigration)*, 2017 FC 16 [*Lazar*], at paras 9-10).

IV. Analysis

A. *Was the Officer's interpretation of "self-employment" under the CEC application unreasonable?*

[14] The Applicant argues that the Officer erred in interpreting what constitutes "self-employment" under the CEC program, by failing to consider the factors prescribed by policy guidelines published by Immigration, Refugees and Citizenship Canada [IRCC] or failing even to refer to those guidelines and by failing to consider certain evidence submitted by the Applicant, specifically the June 22, 2016 letter from Maurice Byrne and the Applicant's T4 slips.

[15] The factors to which the Applicant refers are set out in IRCC's policy guidelines as follows:

In determining whether an applicant under the CEC was an employee or a self-employed individual during their period of qualifying work experience in Canada, CIC officers should consider factors such as:

- the degree of the worker's control or autonomy in terms of how and when work is performed, and the method(s) used to do the work;
- whether the worker owns and/or provides tools and equipment to accomplish the work;
- the degree to which the worker has to perform the work personally and whether the worker has the option of subcontracting work or hiring others to help and assist with completing the work;
- the degree of financial risk assumed by the worker, including whether the worker is required to make any investment in order to complete the work or provide the service and whether the worker is free to make business decisions that affect his/her ability to realize a profit or

incur a loss (as opposed to the opportunity to earn commissions or other productivity bonuses); and

- any other relevant factors, such as written contracts.

[16] The Applicant's position is that the Officer erred by basing the decision entirely on the Applicant's ownership of shares in the business and his designation as an "Owner/Operator" in his work permit, without considering the above factors or the evidence relevant thereto. While the Applicant acknowledges that his ownership of shares in the business is relevant to the determination of whether he is self-employed, he submits that the Officer was still obliged to consider the factors prescribed by the guidelines and in particular to consider his level of control as demonstrated by his particular duties and responsibilities.

[17] Having considered the Officer's analysis as evidenced by the GCMS notes, the record that was before the Officer including the particular items on which the Applicant's arguments rely, and the applicable policy guidelines, I am unable to conclude that the Officer's decision falls outside the range of possible, acceptable outcomes and is therefore unreasonable. I appreciate that the decision is brief and that the Officer's GCMS notes reference only the Applicant's shareholding in the business and his designation as "Owner/Operator" in his work permit. However, this does not translate into a conclusion that the Officer ignored the other evidence that the Applicant submitted. As explained by Justice Gleeson in considering a similar argument in *Lazar*, at paragraph 11 to 15, an immigration officer is presumed to have considered all the evidence before him/her. While silence with respect to directly relevant and contradictory evidence allows the Court to infer that evidence was ignored (see *Cepeda-Gutierrez v Canada*

(*Minister of Citizenship and Immigration*) [1998] FCJ No 1425 [*Cepeda-Gutierrez*]), the evidence upon which the Applicant relies does not give rise to this inference.

[18] I recognize that the Officer does not refer to the T4 slips submitted by the Applicant, and I have no difficulty concluding that the T4s evidence an employment relationship between the corporation, Dairy Queen Collingwood, and Mr. Byrne. However, that is not the question upon which the Officer's decision turned. Rather, the question was whether that employment relationship constituted self-employment. The T4s have little bearing on this question, and the absence of a reference to them in the Officer's decision does not represent a basis to invoke *Cepeda-Gutierrez*.

[19] It is harder still to conclude that the Officer ignored the information provided by Maurice Byrne as to the Applicant's responsibilities, as the Officer's GCMS notes explicitly refer to a letter on file from the company Director as confirming that the Applicant is the principal shareholder of the company. While this appears to be a reference to the September 23, 2015 letter, which refers to the Applicant as the principal shareholder and owner/operator of the restaurant business, as noted above that letter provides essentially the same description of the Applicant's responsibilities as set out in Maurice Byrne's subsequent letter of June 22, 2016. While the GCMS notes do not refer to those responsibilities, their reference to Maurice Byrne's letter precludes a conclusion that the description of those responsibilities was ignored.

[20] As for whether the Officer failed to consider the factors prescribed by IRCC's policy guidelines, and in particular his level of control, I again note the consideration by Justice



Gleeson of a similar argument in *Parssian v Canada (Minister of Citizenship and Immigration)*, 2016 FC 304 [*Parssian*]. At paragraphs 20 to 22, Justice Gleeson concluded that the factors are not mandatory criteria, that the guidelines do not require that all the factors be assessed, that the guidelines do not specify the degree of weight that should be placed on any of the factors, and that the guidelines do not require that an officer consider any of the factors where the officer has no doubt as to whether an applicant under the CEC is a self-employed individual.

[21] I appreciate that, as submitted by Mr. Byrne's counsel, the applicant in *Parssian* acknowledged in documentation submitted in support of his application that he was self-employed. In that respect, the facts in *Parssian* are distinguishable from those in the case at hand. However, as noted by the Applicant, the Officer's decision appears to have been significantly influenced by the undisputed evidence that the Applicant is the principal shareholder of the business. In addition to the factors emphasized by the Applicant, the IRCC guidelines state 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". Taking into account that portion of the guidelines, and the analysis in *Parssian*, I do not find the content of the guidelines to assist the Applicant in arguing that the Officer's decision was unreasonable.

[22] With respect to his work permit, the Applicant argues that the Officer was obliged to look beyond the title of "Owner/Operator" and emphasizes that the National Occupation Classification [NOC] 0631, under which the permit was issued, refers to the possibility that restaurant and food service managers to which that NOC relates may either be employees or self-

employed. I find little merit to this argument, as the record indicates that the occupation “Owner/Operator” on the work permit is not a function of the applicable NOC but rather of how the Applicant was described in the documentation submitted in support of his application for the permit. For instance, the September 23, 2015 letter from Maurice Byrne sought “extension of his temporary work permit to engage in work as Owner/Operator of Dairy Queen Collingwood until November 10 2017”.

[23] In conclusion on this issue, I find no basis for a determination that the Officer’s decision is unreasonable.

B. *Was the Applicant denied procedural fairness in the processing of his application by failing to be notified of the Officer’s credibility concerns?*

[24] It is therefore necessary for me to consider the Applicant’s argument that he was denied procedural fairness, because the Officer did not notify him of, and afford him an opportunity to address, credibility concerns developed by the Officer.

[25] I will first address the evidentiary issue. The affidavit evidence and supporting exhibits to which the Respondent objects represent additional evidence, not before the Officer, about the ownership, structure and operation of the business, intended to support the Applicant’s position that he did not acquire his experience through self-employment. The Applicant acknowledges that this evidence is not admissible for purposes of considering the reasonableness of the Officer’s decision but argues that it is relevant to the procedural fairness issue. His position is not that this evidence assists in demonstrating a breach of procedural fairness. Rather, he submits it

demonstrates that, if he had been afforded an opportunity to respond to the Officer's concerns, there is additional evidence which he could have submitted in response.

[26] As explained below, my conclusion is that there was no breach of procedural fairness, as the Officer was under no obligation to bring to the Applicant's attention the concern that he was self-employed. It is therefore unnecessary for me to consider the Applicant's argument in support of the admissibility of the new evidence.

[27] The Applicant's procedural fairness argument characterizes the Officer's decision as based on concerns about his credibility. He relies on *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283, in which Justice Mosley explained the principles applicable to such an argument as follows at paragraph 24:

[24] Having reviewed the factual context of the cases cited above, it is clear that where a concern arises directly from the requirements of the legislation or related regulations, a visa officer will not be under a duty to provide an opportunity for the applicant to address his or her concerns. Where however the issue is not one that arises in this context, such a duty may arise. This is often the case where the credibility, accuracy or genuine nature of information submitted by the applicant in support of their application is the basis of the visa officer's concern ...

[28] These principles do not assist the Applicant, as it is not possible to characterize the Officer's decision as based on credibility concerns. The decision did not result from the Officer disbelieving the Applicant or any of the evidence submitted in support of his application. Rather, the Applicant's application was denied based on the Officer's analysis that the evidence supported a conclusion that the Applicant was self-employed. The Applicant was therefore owed

no duty of procedural fairness requiring the Officer to inform the Applicant of this analysis before refusing the application.

[29] I note the Applicant's argument that the Officer's decision was based on concerns as to whether the June 22, 2016 letter, having been produced by the Applicant's brother, contained accurate information about the employment relationship. The Applicant supports this argument by reference to the Case Analyst's entry in the GCMS notes that to the effect that the author of the letter has the same last name as the Applicant and could be his brother. I find little merit to this argument. There is no indication that this comment by the Case Analyst influenced the Officer's decision, and particularly no indication that the Officer regarded the source of the letter as raising concerns about its accuracy.

[30] Having found no reviewable error on the part of the Officer, this application for judicial review must be dismissed. Neither of the parties proposed a question for certification for appeal, and none is stated.

**JUDGMENT**

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

No question is certified for appeal.

"Richard F. Southcott"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-5044-16

**STYLE OF CAUSE:** THOMAS FRANCIS BYRNE V THE MINISTER OF  
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