Federal Court  Cour fédérale

Date: 20200327

Docket: IMM-4682-19

Citation: 2020 FC 444

Ottawa, Ontario, March 27, 2020

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

ALIREZA REZAEI

Applicant

and

IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a judicial review application of the decision of a visa officer [Officer] of the Embassy of Canada in Poland, dated May 30, 2019, denying the Applicant's application for a permanent resident visa in the Self-employed Persons class [Application] as the Officer was not satisfied that the Applicant had the ability or the intention to become self-employed in Canada.

II. Background

[2] The Applicant is an Iranian national. In addition to being a graduate of Iran's University of Medical Sciences, the Applicant obtained a calligraphy diploma from the Persian Calligraphers Society. In May 2018, he filed his Application, wishing to be self-employed in Canada as an art producer in the field of Iranian music. When the Application was filed, the Applicant claimed he had about twenty years of experience in the Iranian music industry. In particular, he claimed that from 2002 to 2008 he worked as the artistic director and producer of the Avaye Barbad Institute [Institute], an Iranian corporate entity that produces, releases and distributes Iranian music all around the world. In the course of his career, the Applicant said he has designed more than 200 music album covers.

[3] Beginning in 2008, the Applicant states in his Application that he signed cooperation contracts with the Institute, allowing him to produce music albums independently, but they would be published and distributed through the Institute. He was also assigned all legal titles and copyrights in the past and future publications of the Institute. After having acquired all of the Institute's copyrights and publications, the Applicant registered in Canada, in 2014, along with two Canadian friends, Barbad Records Inc. [Barbad Records], an artistic company aiming to become the leading Persian, Arabic and Ebro music artwork design service provider, producer and distributor for North America and Europe, while basing its operations in Canada. According to the supporting documentation he filed along with the Application, the Applicant owns a thirty percent stake in Barbad Records and is in charge of the overall direction and operations of the company, which he ensures from abroad, as he still resides in Iran.

[4] The Applicant claimed that since 2014, Barbad Records has delivered more than 500 titles of music albums on digital music networks around the globe, has signed a contract with an American music distribution company – The Orchard – in order to expand the sale of its products and services in global markets, and has registered a trademark for a mobile application – Evercover. That mobile application enables users of mobile and electronic devices to create wallpapers for their devices from music album covers that are available on a digital marketplace. According to the Application, Barbad Records earned more than 120,000$ in revenues in 2017 and was expected to earn up to more than 1 million dollars in the following three years of its incorporation. Along with the Application, the Applicant submitted copies of deposit statements of his banking account in Iran to demonstrate that he had funds to invest in Barbad Records.

[5] On May 30, 2019, the Officer denied the Application. In the rather laconic decision letter he sent to the Applicant, the Officer held that he was not satisfied that the Applicant had the ability and intention to become self-employed in Canada and that he met, therefore, the definition of a "self-employed person" as set out in subsection 88(1) of the *Immigration and Refugees Protection Regulations*, SOR/2002-227 [Regulations]. Because the Officer found the Applicant not to be a "self-employed person" within the meaning of that provision, no further assessment was required as per subsection 100(2) of the Regulations.

[6] In the notes he registered in the Global Case Management System [GCMS Notes], the Officer indicated that the Applicant provided insufficient evidence to demonstrate that he had the ability to be self-employed in Canada and that Barbad Records was a viable business for which there was room and need for in Canada. More particularly, the Officer noted that:

a. Barbad Record is a passive business which the Applicant has been running or co-running from overseas;

b. Barbad Records' financial statements for the period between 2014 and 2016 showed a deficit in the company's assets and raised doubt as to its viability;

c. Barbad Records's business plan only provided general and statistical information about the industry in Canada and only provided limited information as to how this general information relates to the Applicant's proposed self-employment; and

d. Although such a visit was not required, the Applicant has not made an exploratory visit to Canada, which the Officer found somewhat unusual given that he has co-owned Barbad Records since 2014.

[7] The Applicant submits that the Officer breached the principles of procedural fairness by failing to provide him with an opportunity to address the Officer's concerns prior to the rejection of the Application. Acknowledging that there is no statutory right to an interview for visa applicants, the Applicant submits that he was nevertheless entitled to be informed of the Officer's concerns by way of a fairness letter.

[8] He submits as well that the Officer committed a reviewable error in assessing his intention and ability to become a permanent resident of Canada under the Self-employed Persons class, by ignoring relevant, substantial and probative evidence or by unreasonably misconstruing the evidence before him.

III. Issues and Standard of Review

[9] The Applicant is raising procedural fairness and reasonableness issues. It is not contested that the former is reviewable on a standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43) whereas the latter is reviewable on a standard of reasonableness (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 16-17 and 25 [*Vavilov*]; *Rabbani v Canada (Citizenship and Immigration),* 2020 FC 257 at para 18-20). It is trite law that the correctness standard does not attract any deference from the reviewing Court, but that the standard of reasonableness does.

IV. Analysis

A. *The Procedural Fairness Issue*

[10] I am not satisfied that the duty of procedural fairness owed to the Applicant was breached in this case as I do not see much support in the case law for the Applicant's contention that an opportunity to respond should be available to visa applicants whenever "they are unaware that the visa officer has any concerns about their applications" (Applicant's Memorandum of Fact and Law at para 38).

[11] As is well established, the duty of procedural fairness owed to visa applicants is limited and positions itself on the lower end of the spectrum of the protection contemplated by the principles of natural justice (*Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264 at

para 23; *Tollerene v Canada (Citizenship and Immigration)*, 2015 FC 538 at para 15 [*Tollerene*]; *Gur v Canada (Citizenship and Immigration)*, 2019 FC 1275 at para 16).

[12] This means that a visa applicant will generally only be offered the opportunity to respond to a potentially adverse conclusion where the visa officer may base said conclusion on information not known to the applicant or when the officer's concern lies with the applicant's credibility or the authenticity of documents he/she submitted in support of his/her application (*Momeni v Canada (Citizenship and Immigration)*, 2017 FC 304 at para 24 [*Momeni*]; see also *Tollerene* at para 16).

[13] Putting it differently, a visa officer has no legal obligation "to seek to clarify a deficient application, to reach out and make the applicant's case, to apprise an applicant of concerns relating to whether the requirements set out in the legislation have been met, to provide the applicant with a running score at every step of the application process, or to offer further opportunities to respond to continuing concerns or deficiencies" (*Lv v Canada (Minister of Citizenship and Immigration)*, 2018 FC 935 at para 23).

[14] Here, the Applicant has not established that neither exception to these principles applies. First, he has not pointed to any evidence considered by the Officer that was unknown to him. Second, he has not even raised that the Officer's concerns lie with his credibility or the authenticity of documents he submitted in support of the Application.

[15] Reliance on *Mohitian v Canada (Citizenship and Immigration)*, 2015 FC 1393, does not advance the Applicant's argument either. In that case, the Court found that the decision of the visa officer was unreasonable because the decision letter and the GCMS notes were fundamentally contradictory, which made the decision unintelligible and, accordingly, unreasonable. The Court then commented on the applicant's complaint that the visa officer had concluded without any prior input from him that he had failed to present a realistic business plan. It appears that the visa application in that case had been in abeyance for more than seven years and that only a few weeks prior to the visa officer's decision denying the visa application, the applicant was requested to provide updated forms and documentation, with a detailed two-pages checklist as to what forms and other documentation he needed to submit. However, there was no requirement, in said checklist, to provide a business plan.

[16] Nevertheless, the visa officer expressed concerns in his decision as to whether the applicant's business plan was realistic. That resulted in the Court finding that it was not fair in these circumstances for the visa officer not to have alerted the applicant of his concerns regarding his business plan.

[17] I believe that the particular circumstances of that case namely the fact that it took more than seven years to process the applicant's visa application, the promptness in dealing with said application after the applicant was requested to provide a detailed list of updated information that did not include the provision of a business plan or updated business pan and the resulting reasonable inference that the provision of such a document was not important or that the one

provided by the applicant did not raise any issues after all – played key roles in the Court's finding that this amounted to a breach of the duty of procedural fairness owed to the applicant.

[18] I am satisfied that there are no such circumstances in the case at bar.

[19] That being said, I am not prepared, however, to conclude that the Officer's decision bears the hallmarks of reasonableness.

B. *The Officer's Decision is reasonable*

[20] The legal and policy framework that applies to visa applications made under the Self-employed Persons class was described as follows in *Momeni*:

> [5] Subsection 12(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], provides that foreign nationals may be selected for permanent residence as members of the economic class on the basis of their ability to become economically established in Canada.
>
> [6] Division 2 of the [*Immigration and Refugee Protection Regulations,* SOR/2002-227 (IRPR)] establishes classes of business immigrants. One of those classes is the Self-employed Person Class. Section 100 of the IRPR provides that based on ability to become economically established in Canada, a foreign national who is self-employed within the meaning of the IRPR may become a permanent resident. Section 100 further states that where a foreign national who applies under the Self-employed Person Class is not a self-employed person within the meaning of the IRPR, the application shall be refused:
>
> | | |
> |---|---|
> | 100 (1) For the purposes of subsection 12(2) of the Act, the self-employed persons class is hereby prescribed as a class of persons who may become permanent residents on the basis of their ability to | 100 (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des travailleurs autonomes est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur |

become economically established in Canada and who are self-employed persons within the meaning of subsection 88(1).	capacité à réussir leur établissement économique au Canada et qui sont des travailleurs autonomes au sens du paragraphe 88(1).
(2) If a foreign national who applies as a member of the self-employed persons class is not a self-employed person within the meaning of subsection 88(1), the application shall be refused and no further assessment is required.	(2) Si le demandeur au titre de la catégorie des travailleurs autonomes n'est pas un travailleur autonome au sens du paragraphe 88(1), l'agent met fin à l'examen de la demande et la rejette.

[7] The IRPR defines a "self-employed person" at subsection 88(1) (emphasis added):

self-employed person means a foreign national who has relevant experience and has the intention and ability to be self-employed in Canada and to make a significant contribution to specified economic activities in Canada	***travailleur autonome*** Étranger qui a l'expérience utile et qui a l'intention et est en mesure de créer son propre emploi au Canada et de contribuer de manière importante à des activités économiques déterminées au Canada.

[8] "Relevant experience" is also defined at subsection 88(1). The relevant experience requirements differ depending on whether the self-employed person's experience has been obtained in the field of (i) cultural activities, (ii) athletics, or (iii) the purchase and management of a farm. Mr. Momeni's claimed experience is in the field of cultural activities:

relevant experience, in respect of (a) a self-employed person, … means a minimum of two years of experience, 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, consisting of	***expérience utile*** (a) S'agissant d'un travailleur autonome… s'entend de l'expérience d'une durée d'au moins deux ans 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, composée :

(i) in respect of cultural activities,	(i) relativement à des activités culturelles :
(A) two one-year periods of experience in self-employment in cultural activities,	(A) soit de deux périodes d'un an d'expérience dans un travail autonome relatif à des activités culturelles,
(B) two one-year periods of experience in participation at a world class level in cultural activities, or	(B) soit de deux périodes d'un an d'expérience dans la participation à des activités culturelles à l'échelle internationale,
(C) a combination of a one-year period of experience described in clause (A) and a one-year period of experience described in clause (B),	(C) soit d'un an d'expérience au titre de la division (A) et d'un an d'expérience au titre de la division (B),
[…]	[…]

[9] The respondent's *Operational Manual OP 8: Entrepreneur and Self-Employed* [Manual] includes further guidance on the definition of "self-employed". That guidance sets out factors for an Officer's consideration including that an applicant show "…that they have been able to support themselves and their family through their talents and would be likely to continue to do so in Canada."

[21] Recently, the Court delved into an analysis of the significance and meaning of the concepts of "intention" and "ability" that are found in the definition of "self-employed person" set out in subsection 88(1) of the Regulations (*Wei v Canada (Citizenship and Immigration)*, 2019 FC 982 [*Wei*]). According to the Court, "the concept underlying a self-employed person under section 88(1) is that permanent residency status is necessary for the success of the project, not that the project can succeed otherwise, but that the [a]pplicant should be rewarded with permanent residency if success results". The goal is that the "Applicant be self-employed in

Canada for the purpose of significantly contributing to a specified economic activity" (*Wei* at para 37).

[22] Regarding the "ability" to be self-employed, the Court held that a permanent resident visa applicant must demonstrate that he/she has extensively planned and detailed the means of execution of his proposed activities in Canada as a self-employed person (*Wei* at para 34).

[23] Regarding the "intention" to be self-employed, the Court held that since it constitutes a mental attribute, it can "only be found as a fact by the examination of past external conduct evidence broadly defined, which proves as a likelihood the end or purpose of the conduct" and that the "intention to fulfill a future commitment depends on evidence of a significant past commitment that goes a long way in enabling the project" (*Wei* at para 40 and 42).

[24] The Court underscored that a more fundamental factor to every application is "a demonstration that the projects have been thoroughly conceived and concrete steps taken to ensure the implementation that will result in a successful economic activity to meet the requirements of a self-employed immigrant under section 88(1)" (*Wei* at para 44).

[25] It is trite law that visa officers considering permanent residence visa applications enjoy a high degree of discretion and are entitled to a considerable degree of deference (*Ul Zaman v Canada (Citizenship and Immigration),* 2020 FC 268 at para 22). However, that discretion, as is always the case, is not absolute (*Azam v Canada (Citizenship and Immigration),* 2020 FC 115 at para 47; *Wang v Canada (Citizenship and Immigration)*, 2019 FC 284 at para 5 [*Wang*]).

[26] I am mindful of the fact that "administrative decision makers are understood to possess specialized expertise on all questions that come before them" (*Vavilov* at para 28) and that the reviewing court conducting a reasonableness review must, in order to fully respect the distinct adjudicating role delegated to these decision makers by the legislator, "focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place" (*Vavilov* at para 15 and 75). This is why reasonableness review finds its starting point in judicial restraint and has always been, and is still, considered as a deferential standard of review (*Vavilov* at para 26 and 75).

[27] However, I am also mindful of the fact that where they are required, reasons for decision "are the primary mechanism by which administrative decision makers show that their decisions are reasonable – both to the affected parties and to the reviewing courts" (*Vavilov* at para 81). A reasonable decision is one "that is based on an internally coherent and rational chain of analysis" (*Vavilov* at para 85). In other words, a reasonable decision is one that "exhibit[s] the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100) and which is justified "in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99, quoting from *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 and 74). Although they are not to be assessed against a "standard of perfection" (*Vavilov* at para 91), "[r]easons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision" (*Vavilov* at para 102).

[28] Also, in conducting a reasonable analysis, the reviewing court must guard against providing reasons that were not given by the administrative decision-maker or from guessing what findings might have been made or speculating as to what the decision-maker might have been thinking, especially where the reasons for decision are silent on a critical issue (*Vavilov* at para 97, quoting with approval from *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11).

[29] On questions of factual findings, in particular, a reviewing court will be entitled to intervene when the decision-maker has "fundamentally misapprehended or failed to account for the evidence before it" (*Vavilov* at para 125-126).

[30] When examined against these guiding principles, the Officer's decision shows shortcomings justifying the Court's intervention. Indeed, in regard of what appears to be a strong record submitted by the Applicant, the Officer, in my view, failed to explain with the requisite degree of justification, intelligibility and transparency, how and why the Applicant's ability, means and intention to become a permanent resident of Canada under the Self-employed Persons class, could reasonably be doubted. In other words, the impugned decision fails to exhibit the requisite degree of justification, intelligibility and transparency in relation to the facts and law that constrained the Officer decision-making process.

[31] As mentioned at the outset of these reasons, the Officer made four findings. First, he found that Barbad Records was "a passive business" which the Applicant had been running or co-running from overseas. However, the Officer did not explain what he meant by "a passive

business". Whatever that means, I see a difficulty with this description as the evidence provided by the Applicant in support of the Application appears to rather suggest a steady flow of activities aimed at ensuring the viability and the success of the self-employment project behind Barbad Records:

a. Barbad Records has been active in Canada since it was incorporated in 2014;

b. It has benefited from the copyrights in Iranian music that the Applicant inherited from the Institute;

c. It has generated revenues;

d. It has signed a contract with an important American music distribution company;

e. It has registered a Canadian trademark and developed a mobile application that enables users of mobile and electronic devices to create wallpapers for their devices from music album covers that are available on a digital marketplace;

f. It has Canadian shareholders and officers;

g. Its main officer and operative – the Applicant – has close to 400,000$ of funds available to invest in the company and will invest, according it the Business Plan, 150,000$ of these funds as soon as he is allowed to settle in Canada.

[32] Second, the Officer found that Barbad Records' financial statements for the period between 2014 and 2016 showed a deficit in the company's assets and raised doubt as to its viability. Again, there is no mention in the Officer's GCMS notes about the funds that the

Applicant has available for the company once he settles in Canada, of the revenues Barbad Records has generated since it has been in operation through its contract with the American music distribution company or of its potential for growth.

[33] Third, the Officer was critical of Barbad Records' business plan, which he found to provide limited, theoretical information on how the Applicant intended to attain his goal of becoming a self-employed person in Canada. Without more, this amounts to a peremptory conclusion when considered in light of the whole evidence that was presented to the Officer regarding the Applicant's ability to become a self-employed person in Canada and the means of execution he had planned for his proposed activities in Canada. This does not meet the justification test, as set out in *Vavilov* at para 102.

[34] Lastly, the Officer mentioned that the Applicant had made no exploratory visit to Canada since the incorporation of Barbad Records. Although he acknowledged that such a visit was not a requirement of the Act and Regulations regarding the Self-employed Persons class of permanent residence visa applicants, he found that "unusual" given that the Applicant has co-owned Barbad Records since 2014.

[35] The fact that a visa applicant has never travelled to Canada is indeed irrelevant to the analysis of a visa application in the Self-employed Persons class (*Wang* at para 10). What we do not know here is the weight the Officer accorded to that finding in rejecting the Applicant's Application. As we have seen, it is not for the Court to speculate on that (*Vavilov* at para 97). In and of itself, this finding constitutes, for that reason, a reviewable error.

[36] At the hearing of this judicial review application, counsel for the Respondent raised a number of what he considered to be inconsistencies in the evidence provided to the Officer by the Applicant. However, these inconsistencies were not addressed by the Officer in his decision and shall not be considered by the Court as the Respondent's submissions on this point amounts to an invitation to provide reasons that were not given by the Officer (*Vavilov* at para 97).

[37] In sum, the reasons provided by the Officer do not allow the Court to understand, when the whole record is considered, why the Officer made his decision and they do not permit it to determine whether the conclusion he reached falls within the range of acceptable outcomes in respect of the facts and the law.

[38] *Vavilov* affirms "the need to develop and strengthen a culture of justification in administrative decision making" (*Vavilov* at para 2). In light of this new paradigm, this is a case where the Court's intervention is warranted as the Officer failed to explain with the requisite degree of justification, intelligibility and transparency, how and why the Applicant's ability, means and intention to become a permanent resident of Canada under the Self-employed Persons class, could, when the record is, as it should, considered in its entirety, reasonably be doubted.

[39] For all these reasons, this judicial review application will be granted and the matter will be remitted to a different visa officer for redetermination. In his written representations before the Court, the Applicant claimed his costs. However, he waived this request at the hearing.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;

2. The decision of the Officer, dated May 30, 2019, dismissing the Applicant's application for permanent residence as a member of the Self-employed Persons class is set aside and the matter is remitted to a different visa officer for redetermination;

3. No question is certified.

"René LeBlanc"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4682-19
STYLE OF CAUSE:	ALIREZA REZAEI v IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JANUARY 15, 2020
JUDGMENT AND REASONS:	LEBLANC J.
DATED:	MARCH 27, 2020

APPEARANCES:

Warren L. Creates	FOR THE APPLICANT
Yusuf Khan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

PERLEY ROBERTSON AL. LLP Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT