Federal Court  Cour fédérale

Date: 20220117

Docket: IMM-7732-19

Citation: 2022 FC 50

Vancouver, British Columbia, January 17, 2022

PRESENT: Mr. Justice McHaffie

BETWEEN:

ORHAN SITKI KUCUKERMAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Orhan Kucukerman is an experienced webpage designer who seeks to emigrate from Turkey to Canada as a member of the self-employed persons class. His application for a permanent resident visa was refused in January 2019, but after this Court granted leave to judicially review that refusal, the Minister agreed to have the application redetermined by another officer. The application was again refused in October 2019, as a visa officer was not

satisfied Mr. Kucukerman had the ability and intent to become self-employed in Canada. Of particular concern to the officer was the quality and sufficiency of the business plan Mr. Kucukerman filed in support of his application.

[2] Mr. Kucukerman again challenges the refusal of his application. He alleges it was unfair for the visa officer not to put their concerns about the business plan to him before rendering an adverse decision on that basis. He also alleges it was unreasonable for the visa officer to focus exclusively on the business plan without considering other aspects of his application, including his skills and past success in establishing a webpage business in Turkey.

[3] I conclude the refusal decision was fair and reasonable. Mr. Kucukerman clearly understood the need to present a business plan and the purpose of doing so. The duty of procedural fairness did not require the visa officer to give Mr. Kucukerman an opportunity to rectify shortcomings in his application that did not implicate his credibility. With respect to the substantive analysis of the application, while the reasons given for the decision could have treated Mr. Kucukerman's successful business history, it is clear the visa officer's principal concern was that he had not adequately demonstrated his ability to establish such a business in Canada on the basis of the business plan. In the context of this application and the regulatory framework, this was effectively determinative. Given the administrative setting of the processing of visa applications, I am satisfied that the decision shows the transparency, intelligibility, and justification required of a reasonable decision.

[4] The application for judicial review is therefore dismissed.

II. Issues and Standard of Review

[5] Mr. Kucukerman raises the following issues on this application:

A. Was the refusal of his application procedurally unfair because the officer did not raise their concerns with his business plan before issuing the refusal?

B. Was the refusal of his application substantively unreasonable because the officer failed to assess material evidence he tendered in support of his application?

[6] As the parties agree, procedural fairness issues are to be reviewed by the Court by asking whether the procedure leading to the decision was fair in all the circumstances: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14. Whether termed a "correctness" standard, a "fairness" standard, or no standard of review at all, the assessment is the same, namely whether the party was given a right to be heard and the opportunity to know the case against them: *Canadian Pacific* at paras 54–56.

[7] The second issue goes to the substantive merits of the case. The parties are again in agreement, recognizing that deference is due to the visa officer and the decision should be reviewed on the reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25. Reasonableness is concerned with the outcome of the decision and the reasoning process that led to that outcome: *Vavilov* at para 87. A reasonable decision is transparent, intelligible, justified in relation to the facts and law, based on an

internally coherent and rational chain of analysis, and responsive to the submissions of the parties: *Vavilov* at paras 15, 85, 95, 127–128.

III. Analysis

A. *The decision was not unfair*

(1) Mr. Kucukerman's application and its refusal

[8] In 2017, Mr. Kucukerman applied for permanent residence under the self-employed persons class. The self-employed persons class is prescribed in the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*] as an economic class of persons who may become permanent residents on the basis of their ability to become economically established in Canada: *IRPR*, ss 88(1), 100; *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], ss 12(2), 14. Subsection 100(2) of the *IRPR* provides that as a minimum requirement, an applicant in the self-employed persons class must meet the following definition of "self-employed person" in subsection 88(1) of the *IRPR*:

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.

[9] Mr. Kucukerman's application indicated that he had been working as a webpage designer since September 2004. He enclosed reference letters, contracts and invoices, referred to his

online portfolio, and described his activities, responsibilities, and duties as a webpage designer. He indicated he intended to be a self-employed webpage designer in Toronto, with an intention to allocate about $150,000 for his business. He provided information regarding his assets, including his history in establishing his own webpage design company in Istanbul in 2013.

[10] Mr. Kucukerman's application was refused by a visa officer with Immigration, Refugees and Citizenship Canada [IRCC] in January 2019, for the primary reason that he had not shown he had done in-depth research of the Canadian market, and in particular Toronto, or that he had adopted a plan that would reasonably be expected to lead to his future self-employment. The officer was not satisfied that Mr. Kucukerman had the ability and intent to be self-employed in Canada as required by the definition of "self-employed person."

[11] Mr. Kucukerman sought leave to judicially review this refusal. After leave was granted, the Minister agreed to resolve the matter by having Mr. Kucukerman's application redetermined by a different officer, with the opportunity to submit further documentation in support of the application.

[12] Mr. Kucukerman filed further documents in October 2019. These included information contained in the original application, as well as a formal business plan setting out Mr. Kucukerman's plan to establish a company to provide webpage design and associated services in Toronto. The business plan highlights Mr. Kucukerman's experience in webpage design, his experience running a successful business in Turkey both before and after founding his company in 2013. It addresses logistical issues regarding the proposed business such as office

location, business assets, and personnel; sets out intended sources of revenue; and gives estimates of the company's sales revenues over a five-year period.

[13] An "Industry Analysis" section in the business plan includes a description of the graphic design and data processing industries, with statistics on industry size and growth. A "Target Market Analysis" section describes Toronto and its demographics, including its Turkish population, as well as the concentration of the industry in Ontario. The business plan provides a "Competition Analysis" based on Google Maps search results showing "approximately 20 web design companies in Toronto" and "20 graphic design companies in Toronto" that could compete with Mr. Kucukerman's proposed company. It asserts that the company's main advantage over competitors would be Mr. Kucukerman's expertise and experience, again referring to his past experience in web design and running a business. The business plan goes on to discuss marketing strategies and key personnel, and sets out financials including a break-even cost analysis, and a sales forecast that estimates revenues from various service areas.

[14] The visa officer reviewing Mr. Kucukerman's application concluded he did not have the ability and intent to be self-employed in Canada, and therefore did not meet the definition of "self-employed" as set out above. The visa officer's notes in the Global Case Management System (GCMS), which are taken as the reasons for decision, reveal the following main concerns, which I have consolidated in some cases to remove repetition:

- the business plan provides only general information about the industry in Canada and about Mr. Kucukerman's planned business;

- insufficient information was provided about the financial details of the proposed business in Canada and the financial projections, especially their source;

- insufficient information was provided to indicate Mr. Kucukerman had made adequate research of the market in Canada, specifically in the area of destination;

- insufficient information was provided to indicate the proposed business would be feasible or that Mr. Kucukerman had adopted a plan that would reasonably be expected to lead to future self-employment and penetration of the webpage design market;

- the business plan simply provided a brief outline of the proposed business's characteristics but insufficient information to satisfy the visa officer that Mr. Kucukerman had the intention and ability to become self-employed.

[15] Mr. Kucukerman was advised of the refusal of his application by letter dated October 24, 2019. The letter advised Mr. Kucukerman that the visa officer was not satisfied he met the definition of a "self-employed person" set out in subsection 88(1) of the *IRPR* "because based on the evidence submitted I am not satisfied that you have the ability and intent to become self-employed in Canada."

(2) There was no procedural unfairness

[16] Mr. Kucukerman argues it was unfair for the visa officer not to give him the opportunity to respond to the identified concerns about the business plan. He notes that neither a business plan nor market research are mandatory requirements under the *IRPA* or the *IRPR*, but rather

information that an officer may request if necessary. He relies on the decision of Justice Boswell in *Mohitian*, as well as the IRCC Overseas Processing Manual entitled "OP 8: Entrepreneur and Self-Employed" [OP 8] referred to in that decision: *Mohitian v Canada (Citizenship and Immigration)*, 2015 FC 1393 at para 21, citing OP 8, s 11.7. He argues that in *Mohitian*, Justice Boswell found that procedural fairness required the visa officer to alert the applicant to issues with their business plan, since it was not a mandatory document: *Mohitian* at para 23.

[17] The Minister argues that Mr. Kucukerman's reliance on *Mohitian* and on OP 8 is misplaced for a number of reasons. First, the Minister relies on an affidavit from a senior IRCC official stating that section 11 of OP 8, which pertains to processing applications for self-employed persons, was replaced in August 2016 by Program Delivery Instructions (PDI) that include instructions on assessing intent and ability to be self-employed in Canada. Second, the Minister notes that *Mohitian* involved a factually different scenario, in which the applicant had not submitted a formal business plan, and was not asked to submit one when further information was requested after many years' delay, but was then faulted for not having a realistic business plan: *Mohitian* at paras 2, 20–23. Third, the Minister notes that since *Mohitian*, this Court has confirmed on a number of occasions the principle that a visa applicant has the obligation to establish their eligibility, and that fairness does not require a visa officer to give an applicant the opportunity to supplement a deficient application.

[18] I agree with the Minister. While Mr. Kucukerman contends that OP 8 must continue to apply because it remains on the IRCC website, the evidence indicates that it remains online because it still applies to applications filed before August 2016. The program delivery update of

August 2016 indicates clearly that information "that was contained" in sections 7, 9, and 11 of OP 8 "can now be found" in the PDI. As the Minister points out, this Court has recognized, based on evidence from the same senior IRCC official, that the PDI replaced section 11 of OP 8 in August 2016: *Jumalieva v Canada (Citizenship and Immigration)*, 2020 FC 385 at paras 10–11, 19. In this regard, Mr. Kucukerman's reliance on *Belen* appears misplaced: *Belen v Canada (Citizenship and Immigration)*, 2019 FC 1175. In that case, Justice McDonald referred to section 5.14 of OP 8, which the program delivery update does not say was replaced by the PDI: *Belen* at paras 9–10. While this section refers to officers giving an applicant a "fair opportunity to correct or contradict" concerns about eligibility or admissibility, it does not purport to broaden the law on procedural fairness or impose an obligation to allow an applicant to supplement an insufficient application.

[19] I note that in *Belen*, as in *Mohitian*, the applicant had not been asked to file a business plan and apparently did not file one, and that Justice McDonald found it impossible to discern what aspects of Ms. Belen's application were considered deficient: *Belen* at para 16; *Mohitian* at para 18. In the present case, Mr. Kucukerman did file a formal business plan. He did so in the context of an earlier refusal of his application based on concerns about his business plan, after which he was given the opportunity to file further documents. Given that he did file a formal business plan, there can be no unfairness arising from the fact that there is no requirement in the *IRPA* or the *IRPR* to file one.

[20] In any case, as the Minister notes, the recent jurisprudence of this Court reiterates that given the low level of procedural fairness due to visa applicants, including applicants in the self-

employed class in particular, there is no duty to give an applicant an additional opportunity to demonstrate their eligibility. In addition to *Jumalieva*, the Minister points to this Court's decisions in *Gur v Canada (Citizenship and Immigration)*, 2019 FC 1275 and *Ebrahimshani v Canada (Citizenship and Immigration)*, 2020 FC 89.

[21] In *Gur*, no formal business plan was filed, although the application included discussion of the applicant's business plans. The visa officer refused the application as not having demonstrated an ability and intention to become self-employed. Justice Roy rejected the applicant's reliance on *Mohitian*, noting the factually different context: *Gur* at paras 13–15. Relying on earlier decisions, he found that the officer had no obligation to notify the applicant of inadequacies, seek clarification, or give an opportunity to respond to deficiencies: *Gur* at paras 16–17, citing *Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264 at paras 24–25, and *Lv v Canada (Citizenship and Immigration)*, 2018 FC 935 at para 23; see to the same effect *Rezaei v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 444 at paras 7–8, 10–18.

[22] In *Ebrahimshani*, as in this case, the applicant did provide a business plan. The visa officer was not satisfied that it demonstrated the applicant's ability and intent to become self-employed and refused the application. Justice Strickland concluded there was no unfairness. Citing *Hamza* and *Lv*, Justice Strickland underscored the applicant's onus to demonstrate eligibility in accordance with the *IRPR* and found the officer's concerns about the insufficiency of the applicant's evidence therefore stemmed from the *IRPR*: *Ebrahimshani* at paras 27–31. As Justice Strickland summarized at paragraph 34:

> In short, the Applicant had the burden of adducing sufficient evidence to support his application. The Officer was not required to alert the Applicant to any insufficiency with his documentation submitted as part of his application. The visa officer's findings related to the sufficiency of evidence provided by the Applicant and stemmed from the [*IRPR*]. The visa officer did not breach the Applicant's right to procedural fairness by failing to give the Applicant an opportunity to respond to the visa officer's concerns about the sufficiency of the evidence.
>
> [Emphasis added.]

[23] In my view, this conclusion applies equally here. While Mr. Kucukerman asserts that he would have provided additional submissions or documents to support or explain his plan if he had known of the visa officer's specific concerns, the obligation is on an applicant to put forward in their application sufficient information to demonstrate eligibility, not to put forward some evidence and expect a visa officer to ask for more.

[24] Mr. Kucukerman suggests that the visa officer's concerns went to credibility, an area where this Court has recognized that fairness may require an opportunity to respond: *Hamza* at para 25. He contends that any issue going to "intent and ability" goes to the genuineness of the application, and thus to credibility, and also that the specific concern about the source of his financial projections pertained to the credibility of those projections. I disagree on both counts. As to the former, an applicant may fail to demonstrate their ability to become self-employed in Canada without their credibility being in any way questioned: *Ebrahimshani* at para 31. As to the latter, read in context, the visa officer's concerns about the source of financial projections was clearly a concern about what the projections were based on, given the absence of any foundation in the business plan for the numbers given, rather than the reliability or trustworthiness of a particular source.

[25] I therefore conclude there was no breach of the duty of procedural fairness.

B. *The decision was not unreasonable*

[26] Mr. Kucukerman argues the visa officer focused exclusively on his business plan, without considering his experience and financial success in the webpage design industry in Turkey, his earlier information technology experience, or the capital he had available to invest in the business. He argues ignoring this information amounts to the visa officer failing to account for the evidence before them, rendering the decision unreasonable: *Vavilov* at para 126.

[27] In assessing the reasonableness of the decision, the administrative setting is again important: *Vavilov* at paras 91, 94–96. This administrative setting includes the high volume of decision-making by visa officers and the circumscribed impact of a visa refusal. This has led this Court to recognize that visa officers are not obliged to give extensive reasons, provided they are sufficient to explain the result: *Yuzer v Canada (Citizenship and Immigration)*, 2019 FC 781 at para 9; *Patel v Canada (Citizenship and Immigration)*, 2020 FC 77 at para 15.

[28] In the present case, one can readily understand that the visa officer was not satisfied that Mr. Kucukerman had satisfactorily demonstrated his ability to establish a web design business *in Canada*. Neither success in the country of origin nor aspiration to establish a business in Canada is necessarily sufficient to demonstrate the ability to become self-employed in Canada: *Li v Canada (Citizenship and Immigration)*, 2019 FC 1027 at paras 3, 23; *Gur* at para 15. As part of the ability to become self-employed, this Court has recognized the importance of an applicant demonstrating that they have adequately researched and planned their proposed venture to satisfy

a visa officer that the plan is realistic: *Wei v Canada (Citizenship and Immigration)*, 2019 FC 982 at paras 34, 44; *Rezaei* at paras 22, 24; *Gur* at para 18; *Ebrahimshani* at paras 50–51; *Singh Sahota v Canada (Minister of Citizenship and Immigration)*, 2005 FC 856 at paras 10, 13–14.

[29] Unlike in *Belen*, the Court is not left with any lack of clarity about the aspect of Mr. Kucukerman's application the visa officer found deficient: *Belen* at para 13. For the same reason, the case is also distinguishable from that of *Rezaei*, also cited by Mr. Kucukerman. In *Rezaei*, Justice LeBlanc, then of this Court, found that in light of "what appears to be a strong record submitted by the Applicant," the visa officer had failed to adequately explain how the applicant's ability, means, and intention to be self-employed could reasonably be doubted: *Rezaei* at para 30. Justice LeBlanc in particular criticized the explanation for the visa officer's four main findings, finding that they did not allow the Court to understand why the officer made his decision: *Rezaei* at paras 31–37.

[30] In the present case, the visa officer's primary concerns were expressed as being lack of specificity, lack of financial detail and foundation for the financial projections, and inadequate research of the Toronto market to show Mr. Kucukerman's ability to penetrate that market and become self-employed. Considering these reasons in the context of the evidence presented, I cannot conclude they were unreasonable. Mr. Kucukerman's business plan presents sales revenue projections without any identifiable basis, and the principal competitive market research about Toronto web design and graphic design companies in particular appears to be exclusively based on a cursory Google Maps search. The visa officer is tasked with assessing such

information and has the experience in doing so. I am not satisfied their assessment was unreasonable.

[31] The visa officer's assessment that Mr. Kucukerman had not shown adequate research or basis for his financial projections was effectively determinative of whether he had shown he had the ability to be self-employed in Canada. In this context, I cannot conclude that it was unreasonable for the visa officer not to have discussed Mr. Kucukerman's prior business successes beyond the brief reference to him being a webpage designer in Turkey. The lack of analysis of other factors that may have been relevant in some circumstances does not render the decision unreasonable, particularly given the recognition that visa officers are not required to give extensive reasons: *Gur* at paras 18–20.

[32] I therefore conclude the visa officer's decision was not unreasonable.

IV. Conclusion

[33] As the visa officer's decision was fair and reasonable, there is no basis for this Court to interfere. The application for judicial review is dismissed. Neither party proposed a question for certification and I agree that none arises.

JUDGMENT IN IMM-7732-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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