

Federal Court



Cour fédérale

Date: 20241016

Docket: IMM-11389-23

Citation: 2024 FC 1642

Vancouver, British Columbia, October 16, 2024

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

**MARJAN RAFATIPOUR AND
MAJID MEMAR KERMANI AND
BARAD MEMAR KERMANI**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision made by an overseas migration officer [the Officer] dated July 13, 2023 [the Decision]. In the Decision, the Officer found that the first Applicant listed above [the Principal Applicant] did not qualify for a permanent resident visa in the self-employed persons class. The Officer found the Principal Applicant did not meet

the definition of a “self-employed person” as set out in subsection 88(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. The Officer was not satisfied based on the evidence submitted that the Principal Applicant had the ability and intent to become self-employed in Canada and to make a significant contribution to specified economic activities in Canada.

[2] As explained in further detail below, this application is allowed, because the Principal Applicant was denied procedural fairness, in that the Officer made a veiled credibility finding related to the Principal Applicant’s communications with potential Canadian clients, without affording the Principal Applicant an opportunity to address the Officer’s credibility concerns.

II. Background

[3] On June 27, 2019, the Principal Applicant applied for a permanent resident visa as a member of the self-employed persons class [the Application]. In the Application, the Principal Applicant listed her husband and their son (the two other Applicants) as her accompanying family members. The Applicants are all citizens of Iran.

[4] In the Application, the Principal Applicant described her intended occupation in Canada to be a self-employed graphic artist.

[5] By letter dated March 25, 2023, Immigration, Refugees and Citizenship Canada [IRCC] requested updated documents from the Principal Applicant. That letter explained the statutory

requirements to be considered a member of the self-employed persons class, requested updated information for the Application, and provided the Principal Applicant with an opportunity to submit any additional information for the reviewing officer's consideration in relation to meeting the definition of a "self-employed person".

[6] On May 18, 2023, the Applicants' counsel submitted updated information and additional material to IRCC.

III. Legislative Framework

[7] A foreign national may be selected for permanent residence in Canada as a member of the economic class based on their ability to become economically established in Canada (*Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], s 12(2)).

[8] Under subsection 100(1) of the IRPR, persons who are self-employed within the meaning of subsection 88(1) of the IRPR may apply to become a permanent resident under subsection 12(2) of the IRPA. If an applicant fails to meet the definition of a "self-employed person" under subsection 88(1) of the IRPR, the applicant will be refused without further assessment (IRPR, s 100(2)).

[9] Subsection 88(1) of the IRPR defines "self-employed person" as:

88 (1) ... 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*)

88 (1) ... 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. (*self-employed person*)

[10] An applicant must establish all three parts of the definition set out in subsection 88(1) of the IRPR to be considered a “self-employed person” (*Mahkam v Canada (Citizenship and Immigration)*, 2022 FC 1586 at paras 15-16). An applicant must establish they have: (a) relevant experience; (b) the intention and ability to be self-employed in Canada; and (c) the intention and ability to make a significant contribution to specified economic activities in Canada (*Rahmati v Canada (Citizenship and Immigration)*, 2024 FC 1158 at para 4).

IV. Decision under Review

[11] In a letter dated July 13, 2023, communicating the Decision to deny the Application, the Officer found, based on the evidence submitted, that the Principal Applicant did not meet the definition of “self-employed person” as set out in subsection 88(1) of the IRPR. Specifically, the Officer was not satisfied that the Principal Applicant had the ability and intent to become self-employed in Canada. In the corresponding Global Case Management System [GCMS] notes, the Officer additionally noted they were not satisfied that the Principal Applicant had the intention and ability to make a significant contribution to specified economic activities in Canada.

[12] The GCMS notes read as follows:

Submissions reviewed including 2023 update. PA's sched 6A refers to CV and business plan. Narrative from PA state they have been working on design and graphic projects in my company "since 5 years". PA's sched A lists them self employed as self-employed Grafist since 2001 no other employment history provided. They state they want to attract clients interested in special design and also teach kids to paint and draw. They also state "I have been trying to make effective communication with some clients in Canada". Some emails on files of people in Canada contacted by PA however no invoices or further evidence to show that contact went beyond the initial email. I would also note that in the emails PA states they have 18 years experience with is

different from the 5 years indicated in their narrative. In addition a couple of the email responded almost word for word the same. Reviewed PA's business plan however I have concerns regarding the viability and coherence of the business plan. There is insufficient evidence on file to support PA's plans as stated. Aside from broad statements PA provides generic open source market research and an explanation of the standard steps one would take to establish a business. Insufficient concrete information directly relevant to PA's specific business in Canada to satisfy me they have the ability and intent to conduct their business activities as stated. PA has failed to satisfy me there is demand for their service or that would support their financial figures as projected. I note while PA may have experience as a graphic designer in Iran given the insufficiencies notes above they have failed to satisfy me this will translate into the cdn context. PA has failed to sufficiently define and quantify how their contributions would be significant to Canada or provide sufficient evidence to support their assertions related to their contributions to Canada. Decision: After considering all the information on file. I am not satisfied that the applicant has sufficient intention and ability to be self-employed in Canada and to make a significant contribution to specified economic activities in Canada I am not satisfied the applicant meets the provisions of R88/definition of self-employed. Pursuant to R 100(2) no further assessment is required and the application is to be refused.

V. Issues

[13] The Applicants raise the following issues for the Court's determination:

- A. Were the Applicants denied procedural fairness in the Officer's consideration of the Application?
- B. Was the Decision reasonable?

[14] The first issue is subject to the correctness standard of review (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35, leave to appeal to SCC refused, 2021 CanLII 69969 (SCC)). As is implicit in its articulation, the

standard of reasonableness applies to the second issue (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17).

VI. Analysis

[15] My decision to allow this application for judicial review turns on one of the Applicants' procedural fairness submissions. In particular, the Applicants argue that, in concluding that the Principal Applicant had not established their ability and intent to become self-employed in Canada, the Officer made a veiled credibility finding related to some of the material submitted in support of the Application, without affording the Principal Applicant an opportunity to address that credibility concern.

[16] In support of the Application, the Principal Applicant included evidence of a number of emails sent to potential clients or contractual partners in Canada, exploring the possibility of providing graphic design services, as well as responses to some of those emails. As identified in the GCMS notes, the Officer had several concerns with these communications, including that no invoices or further evidence had been offered to show the contact went beyond the initial email, as well as a couple of the email responses being "almost word for word the same". The Applicants submit that the latter concern, about the responses being nearly identical, represents a veiled credibility finding.

[17] The Respondent disputes this characterization of this component of the Decision, arguing that the Officer's concern was about the sufficiency of information the Principal Applicant provided regarding their ability to become self-employed in Canada. The Respondent

emphasizes that the Principal Applicant did not provide the Officer with any communications following up on the initial responses received from potential clients or contractual partners.

[18] I agree with the Respondent that the Officer's analysis relates in part to the sufficiency of this evidence. However, it is clear that the Officer's analysis also included a credibility concern. The concern about the email responses being almost identical reads as a concern that the communications are not genuine. As the Applicants submit, unless that concern is understood as a credibility finding, it is unintelligible.

[19] As the Officer questioned the genuineness of the email communications, it was incumbent upon the Officer to provide the Principal Applicant with an opportunity to respond to that concern. There is no evidence that the Officer afforded the Principal Applicant such an opportunity. As such, the Officer's process in arriving at the Decision was procedurally unfair (see, e.g., *Taeb v Canada (Citizenship and Immigration)*, 2023 FC 576 at paras 7-8).

[20] Although I have found a breach of procedural fairness arising from the Officer's credibility concern, I am conscious that the Officer's analysis of the Principal Applicant's communications to potential clients or contractual partners, and the Decision more generally, also relied on analyses surrounding the sufficiency of evidence. I have therefore considered whether the breach of procedural fairness necessarily results in a conclusion that this application for judicial review should be allowed and the Decision set aside.

[21] If an administrative decision breaches procedural fairness, then generally a decision should be sent back for redetermination unless it is found that the application is “hopeless” or “legally inevitable” (*Abdelrahman v Canada (Citizenship and Immigration)*, 2021 FC 527 at paras 21-25). I also note the Respondent’s emphasis of jurisprudential support for the need for an applicant, seeking to establish an ability to become self-employed in Canada, to take concrete steps to achieve a successful economic outcome (see, e.g., *Wei v Canada (Citizenship and Immigration)*, 2019 FC 982 at paras 43-44). Evidence of the Principal Applicant’s efforts to establish commercial contacts in Canada was therefore material to the outcome of the Application.

[22] Against that jurisprudential backdrop, it is not possible to untangle the credibility concern and the sufficiency analyses, such that the Decision can withstand judicial review. I cannot conclude that, even without the credibility concern surrounding the Principal Applicant’s communication with potential clients or contractual partners in Canada, the Officer would necessarily have rejected the Application. As such, I will allow this application for judicial review and set the Decision aside for redetermination. Given that result, it is unnecessary for the Court to address the Applicants’ other arguments.

[23] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-11389-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed, the Decision is set aside, and the matter is returned to another decision-maker for redetermination.
2. No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-11389-23

STYLE OF CAUSE: MARJAN RAFATIPOUR AND MAJID MEMAR
KERMANI AND BARAD MEMAR KERMANI v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

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