

Federal Court



Cour fédérale

Date: 20150922

Docket: IMM-1328-15

Citation: 2015 FC 1103

Montréal, Quebec, September 22, 2015

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

OLGA GURYEVA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The applicant challenges the legality of a decision of a Designated Immigration Officer at the Embassy of Canada in Warsaw [Officer], dated January 23, 2015, whereby the Officer denied the applicant's application for permanent residence in Canada.

[2] On January 8, 2013, the applicant submitted an application for permanent residence in the self-employed person class to the Canadian Embassy in Moscow. In her application, the

applicant states that she has been a self-employed ceramic artist since June 1992. On February 4, 2014, an officer from the Canadian Embassy in Moscow reviewed the applicant's file, providing a case analysis, which was entered into the Computer Assisted Immigration Processing System Notes [CAIPS notes]. On February 17, 2014, a second officer at the Canadian Embassy reviewed the application, indicating that he/she was prepared to accept the application pending some outstanding items, including updated proof of the applicant's self-employment through tax records.

[3] On September 4, 2014, the applicant was notified that her file had been transferred to the Canadian Embassy in Warsaw. On January 23, 2015, the Officer rejected the application. In particular, the Officer concluded that the applicant had not established that she could support herself primarily through self-employment, and was not satisfied that she would make a significant contribution to economic activities in Canada.

[4] Is this decision a reasonable one?

[5] Applicable legal principles are not at issue in this case. The reasonableness standard of review requires that the Court defer to the Officer's decision, provided that it falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 (SCC) at para 47). It is not up to the reviewing court to substitute its own view of a preferable outcome (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 (CanLII), [2009] SCJ no 12 at para 59). It is also well-established that the onus is on an applicant to provide sufficient information to the

officer to support his or her application, and applicants “have an obligation of supporting their application for admission with such documentation as will make out a convincing case”

(*Kameli v Canada (Minister of Citizenship and Immigration)*, [2002] FCJ No 1045, 2002 FCT 772 at para 17; see also: *Hamza v Canada (Minister of Citizenship and Immigration)*, 2013 FC 264, 429 FTR 93 at para 22; *Patel v Canada (Citizenship & Immigration)*, 2011 FC 571, 2011 CF 571 at para 23).

[6] We must start this analysis with subsection 12(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]:

12. (2) A foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada.

[Emphasis added]

12. (2) La sélection des étrangers de la catégorie « immigration économique » se fait en fonction de leur capacité à réussir leur établissement économique au Canada.

[Je souligne]

[7] According to subsection 100(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations], the “self-employed persons class” is defined for the purposes of subsection 12(2) of the IRPA as “a class of persons who may become permanent residents on the basis of their ability to become economically established in Canada and who are self-employed persons within the meaning of subsection 88(1) [of the Regulations]” [emphasis added].

[8] Subsection 88(1) of the Regulations provides:

88. (1) The definitions in this subsection apply in this

88. (1) Les définitions qui suivent s’appliquent à la

Division.	présente section.
“self-employed person”	« travailleur autonome »
“self-employed person” means	« travailleur autonome »
a foreign national who has	Étranger qui a l' <u>expérience</u>
<u>relevant experience and has the</u>	<u>utile et qui a l'intention et est</u>
<u>intention and ability to be self-</u>	<u>en mesure de créer son propre</u>
<u>employed in Canada and to</u>	<u>emploi au Canada et de</u>
<u>make a significant contribution</u>	<u>contribuer de manière</u>
to specified economic	<u>importante</u> à des activités
activities in Canada.	économiques déterminées au
	Canada.
[Emphasis added]	[Je souligne]

[9] First, the applicant submits that the Officer failed to adequately consider the determination of the Moscow officers. The applicant places considerable emphasis on the CAIPS notes and the recommendation of the visa officers at the Canadian Embassy in Moscow who reviewed her file. In particular, the applicant asserts the notes show that she has a great deal of experience, that she is a “world class” artist and that she will make a significant contribution to cultural activities in Canada. The respondent retorts that the Officer was under no obligation to follow any earlier recommendations made by the Moscow visa officers (*Tollerene v Canada (Citizenship and Immigration)*, 2015 FC 538 at para 23 [*Tollerene*]), and that the latter had in fact asked for the production of tax records, which the applicant failed to produce. I agree with the respondent that the Officer had no obligation to follow the recommendation of the visa officers at the Canadian Embassy in Moscow. However, I find that the Officer’s determination that the applicant would not make a significant contribution to the cultural sector in Canada is capricious and arbitrary.

[10] The Officer explains that the applicant's "scope" is local, noting simply that during the past 13 years she has had only 27 exhibitions of her artwork, most of which occurred in her hometown (including all exhibitions since December 2010). However, the applicant is a recognized artist and has considerable experience in the field of ceramics. Her artistic achievements are well supported by the evidence on record, including articles and pictures showing that her art is undoubtedly highly original and artistic. Even if the exhibitions themselves were local, the internet can provide an artist with much broader exposure. The question is whether the applicant's art was known outside her hometown. There are many indications in the record that this is the case here.

[11] Indeed, the CAIPS notes from the Moscow immigration officer, dated February 17, 2014, state:

Based on all the information submitted in subject's portfolio, I am prepared to accept her application pending some outstanding items. Her portfolio indicates she has had her ceramic art displayed in Germany, Moscow, and Czech republic. She is featured on the internet and has been granted award diplomas for some of her art work. I am satisfied that her artistic achievements will contribute to the cultural benefit of Canada. [Emphasis added]

[12] Be that as it may, the respondent submits that the applicant has nevertheless failed to provide convincing evidence of her ability to support herself in Russia or in Canada primarily through the sale of her art. First, the applicant has not presented proof of self-employment through tax records. The applicant claims that self-employed artists are not required to file taxes, but the Officer does not find this claim to be credible. Second, the applicant has also worked as a computer layout operator since 2009, which suggests that she may not be supported primarily through self-employment. Third, the applicant's sales book indicates that her sales revenues are

just above the minimum annual wage in the city of Voronezh (where the applicant was residing at the time of her application). The Officer notes that her bank account history from December 2006 to December 2010 shows a credit turnover of 320,537 RUB, with a credit turnover of 100,000 RUB in 2010. For comparison, the Officer notes that the minimum annual wage in Voronezh for the year 2010 was 51,000 RUB. Sales in the applicant's local market appear to be small.

[13] The applicant contends that the Officer has selectively read the documents she submitted and that the Officer has failed to adequately consider all relevant evidence in coming to the determination that she would not have the capacity to establish herself in Canada as an artist. I must agree. True, the two officers at the Canadian Embassy in Moscow requested additional evidence from the applicant in the form of tax records. But this is not the end of the matter, particularly if we accept that the Officer was not bound by any earlier recommendation. The Officer was required to take a fresh look at the evidence and approach it with an open mind. While the applicant failed to produce the requested tax records, she nevertheless produced a tax inspection certificate of fulfillment of taxpayer's obligations (CAIPS notes, 27 June 2014), which seems to corroborate her assertion that artists in her category are not required to register or pay income tax in Russia. Such evidence should not have been discarded outright by the Officer without further analysis. The practical reality of Russian artists and the existence of any tax exemptions were certainly relevant factors to consider.

[14] The applicant also filed financial evidence of her net worth (Schedule 6A), indicating total assets of approximately \$160,000 CDN. Section 11.3 of the *OP-8 Guide "Entrepreneur and*

Self-Employed” [OP-8 Guide] notes that a person’s financial assets “may [...] be a measure of intent and ability to establish economically in Canada”. While such proof must be weighed in light of other elements, it can serve to corroborate the applicant’s assertion of establishment, and may demonstrate an applicant’s ability to be self-supporting until the self-employment has been created (OP-8 Guide at section 11.3). I also find that the inferences drawn by the Officer with respect to his consideration of the applicant’s bank account history are speculative and arbitrary. The situation of the applicant should be compared with that of other self-employed artists in Russia and that of the general population. Canadian standards are not relevant at that stage of the analysis. While the Officer notes that the applicant’s account history indicated a credit turnover in 2010 of 100,000 RUB, as compared to a minimum annual wage in the city of Voronezh in 2010 of 51,000 RUB, he nevertheless concludes that sales of the applicant’s artwork in her local market “appear very small.” The Officer’s assessment of the applicant’s income thus appears biased, since evidence submitted by the applicant showed an average annual income of 1.6 times the minimum annual income for residents of the city of Voronezh, thereby demonstrating her ability to earn a comfortable living. I agree with the applicant that the Officer’s reference to her bank account history in the CAIPS amounted to his “throwing numbers without any serious rationalisation”.

[15] But there is another area of concern for the Court today. The Officer has also attached great importance to the fact that the applicant has worked part-time as a computer layout operator since 2009, but this element is certainly not determinative of her capacity to establish herself as an artist in Canada. In *Yao v Canada (MCI)*, 1999 CanLII 8419 (FC) at paragraph 12, Justice Sharlow states:

[12] I agree with counsel for Ms. Yao that there are flaws in the reasoning as expressed in the visa officer's statement. It is illogical to reach a negative assessment of Ms. Yao's ability to be a self-employed writer in Canada on the basis that in China she has been employed in other positions while she wrote her books, and that her agent takes care of publishing and business matters for her in China. No doubt many self-employed writers in Canada are also employees, and use agents to publish and market their books.

[16] Therefore, the simple fact that the applicant has had another job since 2009 should not be determinative in itself. The issue is whether the applicant can establish herself as a self-employed artist in Canada. According to section 11.3 of the *OP-8 Guide*, applicants "must show you 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." In this context, the seriousness of the plan of establishment proposed by the applicant had to be carefully reviewed by the Officer, although the applicant was not required to submit a formal business plan as such (OP-8 Guide at section 11.7). The issue is whether a market exists in Canada for the art produced by the applicant. In this respect, the Officer's conclusion that applicant's plan to open a small studio in Vancouver would not make a significant contribution to cultural activities in the country does not take account of the totality of the evidence on record, including the applicant's bank account history and statement of personal net worth, as well as her experience and establishment as an artist.

[17] In conclusion, cumulatively considered, the errors or inappropriate inferences mentioned above cast a serious doubt on the conclusion reached by the Officer. Overall, I have the general impression that, for one reason or another, the Officer was somewhat biased and was seeking by any means possible to dismiss the applicant's application for permanent residence. Accordingly,

the present application shall be allowed, the impugned decision shall be set aside, and the matter shall be sent back for redetermination by another visa officer. The present case does not raise an issue of general importance warranting certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be allowed.

The decision made on January 23, 2015 is set aside and the matter is referred back for redetermination by another visa officer. No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Me Pietro Iannuzzi, L.L.M. FOR THE APPLICANT

Me Anne-Renée Touchette FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mercadente, Di Pace FOR THE APPLICANT
Montréal, Quebec

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada
Montréal, Quebec