Federal Court  Cour fédérale

**Date: 20170323**

**Docket: IMM-1877-16**

**Citation: 2017 FC 304**

**Ottawa, Ontario, March 23, 2017**

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

**BETWEEN:**

**HAMIDREZA MOMENI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

## I. Overview

[1] Mr. Hamidreza Momeni, the applicant, is an Iranian citizen who has worked in the film and art industry for more than 20 years. He applied for permanent residence as part of the Self-Employed Persons class in June 2014. The respondent requested further information from Mr. Momeni in November 2015. The application was refused in March 2016. The Visa Officer [Officer] determined that Mr. Momeni did not satisfy the definition of a self-employed person

under subsection 88(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

[2] Mr. Momeni brings this application for judicial review seeking to have the decision set aside and the matter returned for reconsideration by a different decision-maker. Mr. Momeni argues that the Officer (1) misconstrued the "relevant experience" requirement under subsection 88(1) if the IRPR; and (2) breached the principles of procedural fairness by failing to notify him of concerns with the application.

[3] This judicial review application raises the following issues for the Court's consideration:

A. Did the Officer unreasonably interpret and apply subsection 88(1) of the IRPR?; and

B. Did the Officer breach the principles of procedural fairness?

[4] Having reviewed the parties' written submissions and having heard their oral arguments, I am unable to conclude that the decision is unreasonable or that there was a breach of procedural fairness. The application is dismissed for the reasons set out below.

## II. Legal and Policy Framework

[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 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:

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| 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 become economically established in Canada and who are self-employed persons within the meaning of subsection 88(1). | 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 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):

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| ***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:

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| ***relevant experience***, in respect of | ***expérience utile*** |
| (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 | (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."

## III. Standard of Review

[10] The parties' submissions on the applicable standard of review were limited.

[11] In *Singh v Canada (Minister of Citizenship and Immigration)*, 2016 FC 904 [*Singh*], at paragraphs 8 to 12, Justice James Russell addressed the applicable standard of review in the context of an Officer's decision under section 100 of the IRPR. He concludes that matters of procedural fairness attract a correctness standard of review (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). A correctness standard of review will be adopted when considering the alleged breach of procedural fairness.

[12] In *Singh*, Justice Russell also concluded that where the issues under review engage questions of mixed fact and law they are to be reviewed against a reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Young (Litigation guardian of)*, 2016 FCA 183 at para 7). In this case, Mr. Momeni argues that the Officer misapplied the subsection 88(1) definition of "relevant experience". This raises a question relating to the interpretation and application of the IRPR, the Officer's home legislation.

[13] There is a presumption that the reasonableness standard applies to the interpretation by a decision-maker of his or her home statute (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 22 [*Edmonton East*]; *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 46). That presumption is not rebutted in this case (*Edmonton East* at paras 24, 32-34).

## IV. Analysis

### A. *Did the Officer unreasonably interpret and apply subsection 88(1) of the IRPR?*

[14] Mr. Momeni submits that the Officer's decision demonstrates the Officer misapplied the definition of "relevant experience" under subsection 88(1) of the IRPR. He argues that it is clear from the decision that the Officer accepted he had met the requirement of "two one-year periods of experience in self-employment in cultural activities", but misconstrued the provision as being conjunctive and then found he had not met the requirements for experience at a world class level. I do not agree.

[15] Mr. Momeni relies on two sentences in the Officer's decision in advancing his argument. However, it is necessary to consider the Officer's determination as it relates to the question of relevant experience in the context of the whole decision. In doing so, it is evident that the Officer was aware of the applicable statutory and regulatory framework, having reproduced the relevant provisions, including the IRPR subsection 88(1) definition of "relevant experience". The Officer then notes "I am not satisfied that you meet the overall definition of "self-employed" person as per R88(1)…I am not satisfied that you have sufficient intent and ability to be self-

employed in Canada and to make significant contribution to specific economic activities in Canada…".

[16] Having stated this conclusion the Officer then addressed the question of relevant experience. It is a portion of this paragraph that Mr. Momeni relies upon. The full paragraph states:

> In respect to relevant experience, based on the documents before me, I am satisfied that you have the required experience in the stated self-employed activity. I am not satisfied that you meet the test of relevant experience for the purpose of this application because you have not satisfied me that you have experience in participating at a world class level in cultural activities and I am not satisfied that you have been able to support yourself with your past self-employed activities and that you would be likely to continue to do so in Canada. [Emphasis added.]

[17] In reading the paragraph as a whole, the Officer finds that Mr. Momeni had established the required experience in "a stated self-employment activity". However the Officer did not view these periods of "required experience" as sufficient to satisfy the test of "relevant experience". The Global Case management System [GCMS] notes state **"APPLICANT HAS NOT DEMONSTRATED THAT HE EARNS HIS LIVING FROM SELF EMPLOYMENT. I AM NOT SATISFIED THE APPLICANT IS SELF-EMPLOYED"** (Emphasis in original).

[18] Consideration of Mr. Momeni's ability to support himself and his family through his talents is a factor identified in the Manual and was relevant to the Officer's assessment of whether the relevant experience definition had been satisfied. The Officer was not satisfied that Mr. Momeni had been able to support himself as a self-employed individual in the field of cultural activities and therefore was not satisfied he had met the test for "relevant experience".

Having reached this conclusion, the Officer then noted the absence of experience in world class level cultural activities. The Officer did not err by interpreting the definition of "relevant experience" as requiring Mr. Momeni to satisfy both the self-employment and world class experience prongs of the definition. Rather, the Officer found Mr. Momeni satisfied neither.

[19] The GCMS notes also indicate that the Officer "was not satisfied that the applicant had sufficient intention and ability to be self-employed in Canada and to make a significant contribution to specified economic activities in Canada – in this case cultural activities". The notes indicate that the Officer concluded Mr. Momeni had failed to satisfy any of the three elements of the "self-employed person" definition, relevant experience being one of those elements.

[20] The Officer's language was unquestionably awkward. In this regard, I note that the standard imposed upon decision-makers is not one of perfection. Rather, a decision-maker's reasons must be adequate to explain the basis of the decision: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 18. I am satisfied, when considering the decision letter and GCMS notes together, that the decision in this case meets that standard.

[21] Mr. Momeni also makes submissions to the effect the Officer must have also been satisfied that his self-employment experience was within the 5131 National Occupation Code. These submissions are of no consequence to the Officer's consideration and interpretation of "relevant experience", as that term is used in the IRPR.

[22] Having reasonably concluded that Mr. Momeni is not a self-employed person within the meaning of subsection 88(1), no further assessment of the application was required (IRPR, s 100(2)).

B. *Did the Officer breach the principles of procedural fairness?*

[23] The applicant argues that the Officer relied on evidence of income that was outside the five-year qualifying period and had concerns with the credibility of Mr. Momeni or his financial documents. He argues, relying on *Mohitian v Canada (Citizenship and Immigration)*, 2015 FC 1393 at paras 22-24, that the credibility concerns triggered an obligation to provide a fairness letter seeking an explanation. The failure to do so, he submits, was a breach of procedural fairness.

[24] Decision-makers will generally be required to notify an individual applicant of a potential adverse conclusion and offer the opportunity to respond where: (1) the officer may base the decision on information not known to the applicant; or (2) when there are concerns regarding the applicant's credibility or the authenticity of documents (*Hamza v Canada (Minister of Citizenship and Immigration)*, 2013 FC 264 at para 16). Mr. Momeni has not established that these exceptions apply here.

[25] Mr. Momeni does not point to any evidence that was considered by the Officer and not known to him. Instead, Mr. Momeni argues that the Officer referred to documentation from 2015, which is outside of the applicable period for "relevant experience", as defined at subsection 88(1) of the IRPR.

[26] The financial documentation relied on by the Officer was provided by Mr. Momeni. From this documentation, the Officer generated and included a list of annual earnings from cultural activities between 2009 and 2015 in the GCMS notes. The annual amounts identified were consistently below $4,000 with the exception of 2014, where the amount earned was slightly less than $8,000. It was these numbers coupled with evidence of salary deposits into Mr. Momeni's bank account that led the Officer to conclude Mr. Momeni had not demonstrated that he earns his living from self-employment.

[27] Mr. Momeni's issue with the inclusion of the income for the year 2015 does not render the process unfair. The 2015 income was consistent with the other periods identified, and Mr. Momeni does not argue that the 2015 information was determinative of the Officer's decision. In the circumstances I cannot find that the Officer's reference to this information rendered the process unfair or the decision unreasonable. I also agree with the respondent that, while the 2015 information was outside the relevant period under the definition of "relevant experience", this limitation does not apply to the requirement that the foreign national demonstrate the intention and ability to be self-employed in Canada.

[28] Mr. Momeni acknowledges that where an applicant provides insufficient documents, a decision-maker need not provide a fairness letter. However, he also implies that where a decision-maker reaches a negative conclusion based on sufficient documents, one must infer that the credibility of those documents has been called into question. I strongly disagree with this view. The mere fact that a negative decision is not based on the "lack of documents" does not mean that the documentation before the Officer is not credible. Credible documents may not be

sufficient to satisfy an applicant's evidentiary burden. In these circumstances, the Officer concluded after reviewing the documentary evidence that the prescribed test had not been met. This circumstance does not trigger an obligation to provide a procedural fairness letter *(Lazar v Canada (Citizenship and Immigration)*, 2017 FC 16 at paras 19-22).

## V. Conclusion

[29] The decision letter and the GCMS notes demonstrate a decision-making process that was justified, transparent and intelligible and an outcome that is within the range of "… possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). There was no breach of procedural fairness. The application is dismissed.

[30] The parties have not identified a question of general importance and none arises.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application is dismissed. No question is certified.

"Patrick Gleeson"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1877-16 |
| **STYLE OF CAUSE:** | HAMIDREZA MOMENI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
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| **JUDGMENT AND REASONS:** | GLEESON J. |
| **DATED:** | MARCH 23, 2017 |

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