

Federal Court



Cour fédérale

**Date: 20171030**

**Docket: IMM-4566-16**

**Citation: 2017 FC 964**

**Ottawa, Ontario, October 30, 2017**

**PRESENT: The Honourable Madam Justice Mactavish**

**BETWEEN:**

**SERGH SAPOJNIKOV**

**Applicant**

**and**

**THE MINISTER OF IMMIGRATION,  
REFUGEES AND CITIZENSHIP**

**Respondent**

**JUDGMENT AND REASONS**

[1] Sergh Sapojnikov seeks judicial review of the decision refusing his application for permanent residence in Canada as a member of the Start-up Business Class. A Visa Officer concluded that Mr. Sapojnikov had entered into a business incubation program with the Toronto Business Development Centre primarily for the purpose of acquiring status in Canada, and not for the purpose of engaging in business activities.

[2] Mr. Sapojnikov asserts that the decision was arrived at in a procedurally unfair manner. He submits that the Officer made negative credibility findings based upon concerns with respect to his immigration history, without him being afforded the opportunity to address the Officer's concerns. Mr. Sapojnikov further submits that the Visa Officer's finding that his application was primarily motivated by a desire to obtain status in Canada was influenced by a poison pen letter that was never disclosed to him. Finally, Mr. Sapojnikov argues that the Officer took irrelevant considerations into account in rejecting his application.

[3] For the reasons that follow, I agree that Mr. Sapojnikov was treated in a procedurally unfair manner in the visa process. Consequently, his application for judicial review will be granted.

#### **I. Background**

[4] Mr. Sapojnikov was born in the former Soviet Union and is a citizen of Israel. He describes himself as an inventor and entrepreneur who has developed highly efficient proprietary solar cell technology. He asserts that he has constructed a working prototype solar panel, which has been successfully tested by several third parties, who have confirmed their interest in Mr. Sapojnikov's technology.

[5] In 2005, Mr. Sapojnikov incorporated a company in Nova Scotia, as a subsidiary of a parent company in Israel that was owned by Mr. Sapojnikov and members of his family. Mr. Sapojnikov and his wife then obtained intra-company transferee work permits, allowing them to live and work in Canada. The couple's work permits were set to expire in 2008. However, they had developed concerns about returning to Israel because of conflict taking place

between Israel and Palestine, and their fear of discrimination due to their Christian identity. Consequently, the family filed a refugee claim.

[6] Following the refusal of their refugee claim in 2011, the family applied for a Pre-removal Risk Assessment. They also submitted an application for permanent residence based on humanitarian and compassionate grounds. After both of these applications were denied, the family left Canada when they were required to do so.

[7] In the spring of 2014, Mr. Sapojnikov contacted the Toronto Business Development Centre (TBDC). After six months of “document exchanges, conversations and verifications with the TBDC”, Mr. Sapojnikov signed an agreement to enter into their business incubation program, and he obtained a Commitment Certificate from the TBDC on October 6, 2014. As part of this agreement, Mr. Sapojnikov paid a business incubation program fee of just over \$27,000, and he agreed to pay the TBDC a percentage of any future revenues in royalties. In exchange, he was to receive advisory support, networking opportunities, and access to a physical workspace and tools at the TBDC.

[8] On the basis of his Commitment Certificate, Mr. Sapojnikov applied for permanent residence through the Start-up Business Class (SUBC) in October of 2014. His application included a request for an SUBC work permit, and Mr. Sapojnikov subsequently applied for Authorizations to Return to Canada for himself and his family, at the suggestion of immigration authorities.

[9] A Visa Officer’s notes for June 4, 2015 state that a poison pen letter had been received on January 20, 2015 from an individual named Vacheslav Kleiman. The letter alleged that

Mr. Sapojnikov had taken a significant amount of money from two other individuals or families in exchange for them being included in his start-up business project in order to assist them in acquiring permanent residence in Canada. The notes further state that immigration authorities had attempted to contact the author of the poison pen letter, but had been unsuccessful in doing so.

[10] The Officer's notes also state that the information contained in the poison pen letter suggested that Mr. Sapojnikov "may have been deceitful in alleging to the two other families the extent of their involvement in the immigration process of obtaining Canadian permanent resident status". The notes further stated that "[a]lthough not proven, this may have been a way to allow for the applicant (SAPOJNIKOV, Sergh) to obtain additional funds (given his alleged lack of work at Seven Way Ltd.) in order to allow him to pay for his permanent resident application".

[11] A procedural fairness letter was written to Mr. Sapojnikov the next day seeking additional information with respect to his company and the projects it had undertaken. He was also asked to provide personal and business tax returns for the last five years, as well as proof of settlement funds as well as police certificates for Mr. Sapojnikov and his spouse. No mention was made, however, of the fact that a poison pen letter had been received, nor was the information contained in the letter ever put to Mr. Sapojnikov.

[12] Mr. Sapojnikov replied to this request on June 9 and June 28, 2015, providing detailed information in response with respect to his business plan and his technology. He also provided letters from Canadian entities expressing interest in his technology. He explained why tax returns were not available, and he claimed to have \$47,000 in cash, and provided proof that he had transferred \$28,334.75 to the RBC trust account of TBDC.

[13] Mr. Sapojnikov also provided a contract pursuant to which Mr. Sapojnikov had developed an LED plant-growing Smart Lamp, for which he was paid \$24,000. He also provided a contract under the terms of which he designed and installed a “Smart Home” security system for a client in Israel by the name of Vacheslav Kleiman. Vacheslav Kleiman was, of course, the name of the purported author of the poison pen letter.

[14] On February 24, 2016, the Case Processing Centre – Ottawa (CPC-O) sent Mr. Sapojnikov a procedural fairness letter stating that a Visa Officer had concluded that Mr. Sapojnikov had applied for a SUBC visa for the purpose of acquiring status in Canada, and not for the purpose of engaging in business. The letter further indicated that the basis for coming to this conclusion was that Mr. Sapojnikov had stated that he was the only founder, owner and director of both the Canadian company and its Israeli parent. In addition, Mr. Sapojnikov had admitted that the company had no financial operations between 2005 and 2013, and he had not filed personal or business income taxes in 2013 and 2014 in Israel. Finally, the Officer noted that the Israeli company existed only on paper, and that it did not have any tangible operations.

[15] Mr. Sapojnikov responded to this letter with a detailed explanation addressing each of the Officer’s concerns. He explained that he was the founder and director of the Canadian company, and not the Israeli company. He further explained that his father had been the majority shareholder of the Israeli company, and that Mr. Sapojnikov’s knowledge of the status of the Israeli company had been limited since the death of his father in 2011. He did, however, provide a detailed accounting of the assets of the Israeli company between 1998 and 2007, including evidence of registered patents and a physical address. Finally, Mr. Sapojnikov explained that he

did not have Israeli tax returns because his income had been taxed at source, with the result that he did not have to file tax returns.

[16] On May 24, 2016, the CPC-O sent Mr. Sapojnikov a further email, this one requesting evidence of support from various institutions, as well as particulars of the steps that he had taken to advance his invention since leaving Canada in 2013. He was also asked to explain why the development and testing of his product had only occurred in Canada. Once again, Mr. Sapojnikov wrote a detailed reply, responding to each of the concerns that had been identified

[17] By letter dated October 17, 2016 Mr. Sapojnikov was advised that his application for permanent residence in Canada as a member of the SUBC had been refused as a Visa Officer had concluded that Mr. Sapojnikov had entered into a business incubation program with the TBDC primarily for the purpose of acquiring status in Canada, rather than for the purpose of engaging in business activities.

## **II. Analysis**

[18] The determinative issues in this case involve questions of procedural fairness. Where an issue of procedural fairness arises, the Court's task is to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances: in other words, to apply the correctness standard: see *Mission Institution v. Khela*, 2014 SCC 24 at para. 79, [2014] 1 S.C.R. 502.

A. *The Poison Pen Letter*

[19] The first issue relates to the failure of the CPC-O to disclose the poison pen letter to Mr. Sapojnikov before refusing his application for permanent residence.

[20] It is a breach of procedural fairness not to disclose extrinsic evidence, such as a poison pen letter, that is subsequently relied upon in making a decision: *Qureshi v. Canada (Citizenship and Immigration)*, 2009 FC 1081 at para. 28, [2010] 4 F.C.R. 256.

[21] The Respondent submits that the letter was not relied on in making the decision to refuse Mr. Sapojnikov's application for permanent residence. The Respondent notes that the CPC-O had attempted to contact the author of the letter in 2016, submitting that no further consideration was given to the letter after it had been unsuccessful in reaching the writer or the letter. I do not accept this submission.

[22] As Mr. Sapojnikov notes, the poison pen letter arrived relatively early in the decision-making process, submitting that it would inevitably have set off credibility concerns with respect to the *bona fides* of his application.

[23] It is particularly troubling that the content of the poison pen letter is discussed at some length in the GCMS notes of June 4, 2015, and that a procedural fairness letter was sent to Mr. Sapojnikov *the very next day*, seeking detailed information with respect to his company and the projects it had undertaken, as well as financial and tax information and police certificates.

[24] The logical inference to be drawn from the close proximity in time of the two events is that the contents of the poison pen letter triggered concerns on the part of the CPC-O with respect to the credibility of Mr. Sapojnikov and the underlying purpose of his application for

permanent residence, and that it played a role in the decision to send him the procedural fairness letter of June 5, 2015. For whatever reason, however, Mr. Sapojnikov was not made aware of the existence of the poison pen letter or of its contents.

[25] Because the issue raised by the poison pen letter involves a question of procedural fairness, Mr. Sapojnikov was permitted to supplement the record on his application for judicial review: *Assn. of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22 at para. 20, 428 N.R. 297. Mr. Sapojnikov produced an affidavit sworn by Mr. Kleiman in support of his application for judicial review in which Mr. Kleiman denies having sent the poison pen letter. It would have been up to a Visa Officer to determine the probative value of such a denial, but Mr. Sapojnikov was never afforded the opportunity to put this evidence before the Officer.

[26] I recognize that the level of procedural fairness owed to visa applicants is at the lower end of the spectrum: *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297 at para. 41, 195 D.L.R. (4th) 422 (F.C.A.). That said, as Mr. Sapojnikov's credibility played a key role in determining whether his application was motivated primarily for the purpose of obtaining status in Canada, it is hard to see how the poison pen letter would not have played at least some role in the Officer's evaluation of his credibility. As a result, it was fundamentally unfair for consideration to be given to the contents of the poison pen letter without Mr. Sapojnikov having been afforded an opportunity to address it.

[27] While this provides a sufficient basis for granting Mr. Sapojnikov's application for judicial review, I will also briefly address the issue of his immigration history.



B. *Mr. Sapojnikov's Immigration History*

[28] Although it is not mentioned in the decision letter, it is apparent from the GCMS notes that Mr. Sapojnikov's immigration history played a significant role in the decision to refuse his application for permanent residence.

[29] For example, the Officer notes that instead of leaving the country after the expiry of his work permits, Mr. Sapojnikov "applied for refugee status and after the claim was rejected he applied for H&C and sought every avenue of appeal until finally deported on 23 October 2016". The notes further observe that Mr. Sapojnikov's record "indicates a disregard for the established procedures by working illegally and overstaying". The notes also state that Mr. Sapojnikov's background information "points towards persistence in remaining, if not also returning to Canada by any means possible, let alone circumventing immigration rules and regulations".

[30] Mr. Sapojnikov takes issue with each of these statements. He notes that he followed the immigration avenues that were lawfully available to him. He also takes issue with the claim that he was deported, claiming that he left the country voluntarily when he was required to do so. Finally, Mr. Sapojnikov denies ever having worked illegally in this country.

[31] The Respondent submits that Mr. Sapojnikov would have been well aware of the details of his own immigration history, with the result that there was no obligation on the Visa Officer to inform him of this. With respect, this misses the point. While Mr. Sapojnikov was undoubtedly aware of the details of his immigration history, he was not aware of the Officer's finding that he allegedly worked illegally in Canada and that he had allegedly circumvented Canadian immigration rules. Consequently, Mr. Sapojnikov had no opportunity to challenge the findings cited above. This constitutes a further breach of procedural fairness in this case.

**III. Conclusion**

[32] For these reasons, the application for judicial review is allowed. I agree with the parties that the case is fact-specific and does not raise a question that is suitable for certification.

**JUDGMENT IN IMM-4566-16**

**THIS COURT'S JUDGMENT is that**

1. This application for judicial review is allowed and the matter is remitted to a different Visa Officer for re-determination.

"Anne L. Mactavish"  
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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4566-16

**STYLE OF CAUSE:** SERGH SAPOJNIKOV v THE MINISTER OF  
IMMIGRATION, REFUGEES AND CITIZENSHIP

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** OCTOBER 24, 2017

**JUDGMENT AND REASONS:** MACTAVISH J.

**DATED:** OCTOBER 30, 2017

**APPEARANCES:**

Christopher Collette

FOR THE APPLICANT

John Loncar

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Bellissimo Law Group  
Barristers and Solicitors  
Toronto, Ontario

FOR THE APPLICANT

Attorney General of Canada  
Toronto, Ontario

FOR THE RESPONDENT