Federal Court  Cour fédérale

Date: 20180919

Docket: IMM-4482-17

Citation: 2018 FC 935

Montréal, Quebec, September 19, 2018

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

WUXIAN LV

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Mr. Wuxian Lv, applied for permanent residence in Canada as a member of the economic class, under the self-employed person category. Having worked at a fruit farm in China, his country of citizenship, Mr. Lv intended to manage a farm in Canada, one of only three possible categories recognized by the Canadian immigration authorities to be admitted in Canada

as a self-employed person. Mr. Lv submitted that he had the required minimal two periods of one-year experience in the management of a farm and, in support of his application, he provided a letter from Pingnan Lvtian Farm's general manager indicating that he had worked there from 1991 to 2014 and was in charge of marketing and technical management.

[2] On August 22, 2017, an immigration officer at the Consulate General of Canada in Hong Kong [Officer] interviewed Mr. Lv to verify whether he complied with the selection criteria applicable to the self-employed class. The following day, Mr. Lv sent a letter to the Officer further describing how he was involved in managing Pingnan Lvtian Farm, in particular for financial decisions. In a decision dated August 25, 2017, the Officer rejected Mr. Lv's application [Decision]. The Officer found that Mr. Lv had failed to demonstrate that he had the minimum two years of relevant experience managing a farm, as required by subsection 88(1) and section 100 of the *Immigration and Refugee Protection Regulations* SOR/2002-227 [IRP Regulations].

[3] Mr. Lv has applied to this Court for judicial review of the Officer's Decision dismissing his permanent residence application. He argues that the Officer breached the principles of procedural fairness in rendering her Decision as she failed to provide him with an opportunity to respond to the concerns she still had further to the additional letter he had provided the day following the interview. Mr. Lv asks this Court to quash the Decision and to send it back for redetermination by a different immigration officer.

[4] As admitted by counsel for Mr. Lv at the hearing before this Court, the sole issue raised by Mr. Lv's application for judicial review is whether the Officer breached her duty of procedural fairness by failing to provide Mr. Lv with an opportunity to respond to her concerns.

[5] Having considered the evidence before the Officer and the applicable law, I can find no basis for overturning the Officer's Decision. In the circumstances of this case, the Officer was under no obligation to give Mr. Lv an additional opportunity to respond to her concerns or to hold another oral hearing further to his post-interview letter. The Officer fulfilled her duty to act fairly towards Mr. Lv at all steps of the process, and no breach of procedural fairness occurred here. There are no grounds to justify this Court's intervention, and I must therefore dismiss Mr. Lv's application for judicial review.

II. Background

A. *The Decision*

[6] The Officer's Decision is brief. As is often the case in matters of this nature, the Decision of the Officer used standardized language, except for two paragraphs relating to Mr. Lv's particular situation.

[7] After describing the requirements set out in the IRP Regulations, the Officer expressed the concerns she had presented to Mr. Lv at the interview and stated the following:

> You failed to satisfactorily demonstrate, in respect of the purchase and management of a farm, that you have a minimum of two one-year periods of experience in the management of a farm. In support of your management experience of a farm, you only submitted an employment reference letter issued by the General Manager of Pingnan Lvtian Farm. At interview, you were unable to discuss in any details or depth regarding your role and experience at Pingnan Lvtian Farm to demonstrate your farm management experience.

[8] The Officer then concluded that, after a careful consideration of the information in Mr. Lv's application and his statements at the interview, she was not satisfied that Mr. Lv had the relevant experience or that he had the ability and intent to make a significant contribution to specified economic activities in Canada. Since Mr. Lv did not meet the definition of "self-employed person" prescribed in the IRP Regulations, the Officer concluded that Mr. Lv was not eligible to become a permanent resident in Canada under that class and his application was refused.

[9] The notes taken by the Officer in the Global Case Management System [GCMS], which form part of her reasons, offer more detail and provide further light on the grounds for the Officer's refusal.

[10] The GCMS notes entered on August 25, 2017 indicate that, at the beginning of the interview held on August 22, Mr. Lv informed the Officer that he had no additional documents to provide, other than the letter from the farm's general manager previously submitted with his application for permanent residence. With respect to his work at Pingnan Lvtian Farm, the Officer notes that Mr. Lv was unable to describe in any detail or depth his role as vice general manager during the interview. Mr. Lv however stated that he was mainly responsible for farming

the fruits and that he was not involved in the financial, administrative or personnel aspects of the farm. Moreover, the Officer observes that, while the unsigned letter from the farm's general manager mentioned that Mr. Lv was in charge of the farm's marketing and technical management, it offered no details on Mr. Lv's duties and responsibilities in that capacity. In her notes, the Officer specifies that, based on the information and documents provided by Mr. Lv in his file and at the interview, she was "not satisfied that [Mr. Lv had] sufficiently established that he [had] a minimum of two one-year periods of experience in the management of a farm". The notes further indicate that the Officer advised Mr. Lv of these concerns at the interview, but that Mr. Lv "did not provide any additional information".

[11] Concerning his subsequent work as an owner and manager of an agricultural material business, the Officer observes that this work experience was not related to the management of a farm.

[12] Finally, the GCMS notes mention that, the day following the interview, Mr. Lv submitted an additional letter, authored by him, stating that he does "participate in major decision for financial affairs (sic)" at the farm, "such as farm annual budget, important expense and financial program, and also read account concise report every month (sic)". However, the Officer was not satisfied that this submission addressed the concerns she had identified at the interview, observing that Mr. Lv had been given ample opportunity to demonstrate his experience in the management of a farm but had been unable to do so. The Officer found Mr. Lv's post-interview letter to be "self-serving" and "not substantiated by additional reliable or verifiable evidence".

B. ***The standard of review***

[13] In their submissions, both Mr. Lv and the respondent, the Minister of Citizenship and Immigration [Minister], state that questions of procedural fairness are reviewable on the standard of correctness. I take a slightly more nuanced approach to this issue.

[14] It is generally accepted that "correctness" is the standard for determining whether a decision-maker complies with the duty of procedural fairness and the principles of fundamental justice (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*] at paras 34-36; *Canada (Attorney General) v Sketchley*, 2005 FCA 404 at para 53). When applying the correctness standard, a reviewing court will show no deference to the decision-maker's reasoning process, but will rather undertake its own analysis of the question (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 50).

[15] I say "generally" to qualify the common way in which courts have referred to the applicable standard of review as, in recent years, some decisions of the Federal Court of Appeal have developed a hybrid standard of review on issues of procedural fairness, suggesting that the standard may be better expressed as "correctness with some deference to the [administrative tribunal's] choice of procedure" (*Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 at para 70; *Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at paras 34-42; *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at paras 67-72; *Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 at paras 11-14). In the

more recent *CPR* case, the Federal Court of Appeal has however sought to put an end to this debate, affirming that the "suggestion that procedural fairness is reviewed on a correctness standard with some deference is both confusing and unhelpful" (*CPR* at para 44).

[16] In *CPR*, the Federal Court of Appeal instead emphasized that "correctness" in the context of procedural fairness should be approached from a different angle, an angle somewhat detached from the usual standard of review analysis. In this particular setting, "correctness" simply means that a reviewing court must be satisfied that the duty to provide procedural fairness has been met. The Court stated that where the duty of an administrative decision-maker to act fairly is questioned, assessing a procedural fairness argument requires to verify whether the procedure was fair having regard to all of the circumstances (*CPR* at para 54), including the five, non-exhaustive contextual factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] at paras 25-26). It is up to the reviewing court to make that determination and, in conducting this exercise, the court is called upon to ask, "with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed" (*CPR* at para 54). In other words, it requires the court to determine whether the administrative process followed by the decision-maker achieved the level of fairness required by the circumstances of the matter (*Aleaf v Canada (Citizenship and Immigration)*, 2015 FC 445 at para 21). As the Federal Court of Appeal eloquently expressed it in *CPR*, "[n]o matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond" (*CPR* at para 56).

[17] Therefore, the true question raised when procedural fairness and the duty to act fairly are the object of an application for judicial review is not so much whether the decision was "correct", but rather whether, taking into account the particular context and circumstances at issue, the process followed by the decision-maker was fair and offered to the affected parties a right to be heard and the opportunity to know and respond to the case against them (*Makoundi v Canada (Attorney General)*, 2014 FC 1177 at para 35).

III. Analysis

[18] Mr. Lv alleges that the Officer breached her duty of procedural fairness by failing to provide him with an opportunity to respond to her concerns regarding his experience managing a farm and the submissions he provided after the interview. Mr. Lv contends that his post-interview letter spoke of his role managing the financial affairs of the farm, which was one of the concerns identified in the Officer's notes. Mr. Lv takes particular exception with the words "self-serving" used by the Officer in her notes to describe his post-interview letter, arguing that such language reflects credibility concerns with his evidence. Mr. Lv submits that, when an immigration officer doubts the credibility of a document submitted by an applicant, the applicant must have an opportunity to respond to these credibility concerns (*Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264 [*Hamza*] at para 25; *Hassani v Canada (Citizenship and Immigration)*, 2006 FC 1283 [*Hassani*] at para 24). In support of his position, Mr. Lv relies more specifically on two decisions of this Court where dismissing evidence as "self-serving" was found to be a credibility matter, thereby requiring that the applicant have an opportunity to respond (*Zmari v Canada (Citizenship and Immigration)*, 2016 FC 132 [*Zmari*] at paras 21-22; *Hamza* at paras 38, 43).

[19] I am not persuaded by Mr. Lv's submissions.

[20] There are three reasons for that. First, contrary to what transpires from Mr. Lv's arguments, the degree of procedural fairness owed to applicants for permanent residence sits at the low end of the spectrum. Second, Mr. Lv's recollection and portrayal of the interview process conducted by the Officer ignore the multiple opportunities offered to him to know the case he had to meet. In my view, the administrative process followed by the Officer achieved the level of fairness required by the circumstances of this matter. Third, in his effort to unearth a basis for his alleged breach of procedural fairness, Mr. Lv takes the Officer's words "self-serving" out of their context and conflates the concept of credibility with the sufficiency and probative value of the evidence. A finding that evidence is insufficient does not raise procedural fairness issues.

A. *The required degree of procedural fairness*

[21] Whether a decision is procedurally fair must be determined on a case-by-case basis. It is well recognized that the requirements of the duty of procedural fairness are "eminently variable" (*Dunsmuir* at para 79) and "[do] not reside in a set of enacted rules" (*Green v Law Society of Manitoba*, 2017 SCC 20 at para 53). The nature and scope of the duty of procedural fairness are flexible and will vary depending on the attributes of the administrative tribunal and its enabling statute, the specific context and the various factual situations dealt with by the tribunal, as well as the nature of the disputes it must resolve (*Baker* at paras 23-27; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115); *Varadi v Canada (Attorney General)*, 2017 FC 155 at paras 51-52). The level and the content of the duty of procedural fairness are determined according to the context of each case (*Baker* at para 21). Its purpose is to ensure that

administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully, and to have them considered by the decision-maker (*Baker* at para 22).

[22] It is well-established that an immigration officer's duty on an application for permanent residence under a specific class (such as the self-employed class sought by Mr. Lv) is relaxed. As correctly stated by the Minister, the duty of procedural fairness generally owed in an application for a permanent resident visa is located towards the lower end of the range (*Canada (Minister of Citizenship and Immigration) v Patel*, 2002 FCA 55 at para 10; *Kamchibekov v Canada (Citizenship and Immigration)*, 2011 FC 1411 at para 23). More specifically, in the context of a visa officer's decision on an application for permanent residence, the duty of fairness is quite low and easily met, "due to the absence of a legal right to permanent residence, the fact that the burden is on the applicant to establish [his] eligibility, the less serious impact on the applicant that the decision typically has, compared with the removal of a benefit, and the public interest in containing administrative costs" (*Tahereh v Canada (Citizenship and Immigration)*, 2008 FC 90 at para 12). The onus is on visa applicants to put together applications that are convincing, to anticipate adverse inferences contained in the evidence and address them, and to demonstrate that they have a right to enter Canada (*Hassani* at paras 21, 26). Procedural fairness does not arise whenever an officer has concerns that an applicant could not reasonably have anticipated (*Singh v Canada (Citizenship and Immigration)*, 2012 FC 526 at para 52).

[23] In the context of permanent residence applications, an immigration officer has no legal obligation to seek to clarify a deficient application, to reach out and make the applicant's case, to apprise an applicant of concerns relating to whether the requirements set out in the legislation have been met, to provide the applicant with a running score at every step of the application process, or to offer further opportunities to respond to continuing concerns or deficiencies (*Bhatti v Canada (Citizenship and Immigration)*, 2017 FC 186 at para 46; *Sharma v Canada (Citizenship and Immigration)*, 2009 FC 786 at para 8; *Mazumder v Canada (Minister of Citizenship and Immigration)*, 2005 FC 444 at para 14; *Kumari v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1424 at para 7; *Fernandez v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 994 (QL) at para 13; *Dhillon v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 574 (QL) at paras 3-4). To impose such an obligation on a visa officer would be akin to giving advance notice of a negative decision, an obligation that has been expressly rejected by this Court on many occasions (*Penez v Canada (Citizenship and Immigration)*, 2017 FC 1001 at para 37; *Tofangchi v Canada (Citizenship and Immigration)*, 2012 FC 427 at para 45; *Ahmed v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 940 (QL) at para 8).

[24] It is under that light that I must determine whether the administrative process followed by the Officer with respect to Mr. Lv achieved the level of fairness required by the circumstances of this matter.

B. ***The multiple opportunities offered to Mr. Lv***

[25] I cannot help but underscore that, in his submissions, Mr. Lv's recollection and portrayal of the interview process conducted by the Officer offer a truncated view of what actually occurred and turns a blind eye on the multiple opportunities offered to him to know the case he had to meet and to be heard.

[26] In this case, Mr. Lv has been provided with many opportunities to respond to the legislative requirements of the self-employed class and to answer the Officer's concerns with his lack of relevant work experience. After submitting his application, Mr. Lv had received a document request letter advising him to be prepared to demonstrate, at the interview, that he complied with the selection criteria applicable to the self-employed class (and notably his experience managing a farm). This letter also advised Mr. Lv to bring with him all documentation not already submitted to establish his stated work experience. However, Mr. Lv did not bring any additional documents with him at the interview. He then had the opportunity, at the interview itself, to answer questions from the Officer and to respond to the concerns expressed verbally by the Officer. He was offered opportunities to establish his relevant experience, but did not provide any additional information at the time of the interview, nor any details or depth regarding his role and experience at Pingnan Lvtian Farm. All of these steps were detailed in the GCMS notes prepared by the Officer on August 25, 2017, contemporaneously with the events. Nothing in the record allows me to raise any doubt as to the accuracy of the Officer's recollection of those events, which form part of her reasons for rejecting Mr. Lv's application.

[27] The Officer considered the documents submitted by Mr. Lv with his application, most notably his application form and the reference letter from the general manager at Pingnan Lvtian Farm, as well as the responses provided by Mr. Lv at the interview. In light of all this, she concluded that there was insufficient evidence to establish that he possessed the necessary work experience in the management of a farm.

[28] I do not detect any breach of the principles of procedural fairness in the decision-making process followed by the Officer in the circumstances. On the contrary, Mr. Lv had multiple opportunities to be heard and to understand the case he had to meet, prior to submitting the post-interview letter which ended up contradicting the statements he had given the day before to the Officer (when he stated that he was not involved in the financial aspects of the farm). Mr. Lv's arguments suggesting that he was not given an opportunity to be heard and to disabuse the Officer of her concerns simply do not hold water and do not reflect the actual contents of the Decision or the facts surrounding the treatment of his application.

[29] The duty of fairness obliges visa officers to provide sufficiently clear, precise and intelligible reasons, and I am satisfied that the Officer amply met that standard. An immigration officer's reasons are sufficient so long as he or she gave an explanation to the applicant as to why he did not qualify in the prescribed class (*Adu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 565 at para 14). While an officer's reasons may be brief, they are sufficient if they enable the applicant to understand why his application was rejected (*Sepehri v Canada (Citizenship and Immigration*, 2007 FC 1217 at para 4). In this case, the Officer's

reasons, and notably the GCMS notes, fulfill their function of allowing Mr. Lv to know why he was refused.

[30] I agree with the Minister that the rules of procedural fairness did not require the Officer to provide Mr. Lv with yet an additional opportunity to respond to her concerns following the submission of the post-interview letter and the Officer's decision not to give it any weight (*Walia v Canada (Citizenship and Immigration)*, 2016 FC 1171 at para 17). Since the applicant has the burden of providing reliable and probative evidence sufficient to meet his or her burden of proof as well as the standard of proof, an immigration officer does not have a duty to raise doubts or concerns when they arise from legislative requirements or from material known to the applicant (*Obeta v Canada (Citizenship and Immigration)*, 2012 FC 1542 at paras 25-26).

[31] Looking at the Decision as a whole, I am convinced that the administrative process followed by the Officer achieved the level of procedural fairness required by the circumstances of this matter.

C. *The "self-serving" statement and the sufficiency of the evidence*

[32] In his effort to find a basis for his alleged breach of procedural fairness, Mr. Lv takes particular exception with the term "self-serving" used by the Officer to describe his post-interview letter. Mr. Lv claims that, by discounting the letter as self-serving, the Officer in fact found that the veracity of its contents was diminished. Since credibility was an issue, argues Mr. Lv, a further oral hearing should have been convened or an opportunity to address the Officer's

concerns raised by the document should have been offered. According to Mr. Lv, the failure to have done so amounts to a breach of the Officer's duty of fairness.

[33] I disagree. In my view, Mr. Lv's arguments on this front raise two fundamental problems: the words "self-serving" are taken out of their context, and the distinction between credibility and sufficiency of the evidence is ignored.

(1) The context surrounding the "self-serving" statement

[34] First, by focusing solely on the term "self-serving", Mr. Lv misrepresents the Officer's statement and disregards the rest of the sentence expressly entered by the Officer in her notes. What the Officer found is not only that Mr. Lv's submissions in his post-interview letter were "self-serving", but also that they were "not substantiated by additional reliable or verifiable evidence". Evidently, the term "self-serving" appears to have energized Mr. Lv's procedural fairness argument, but there is a profound dissonance between Mr. Lv's amputated reading of the Officer's Decision and what the Decision actually says. The qualifier "self-serving" used by the Officer cannot be dissociated from the fact that Mr. Lv's post-interview letter was found not to be supported by additional reliable and persuasive evidence. It also cannot be isolated from the Officer's comments on the opportunities previously missed by Mr. Lv to demonstrate his work experience.

[35] It is worth citing the relevant extract from the Officer's GCMS notes in its entirety:

> I am not satisfied that this submission addressed the concerns identified to [Mr. Lv] at the interview. [Mr. Lv] was given ample opportunity to demonstrate his experience in management of a farm but he was unable to do so (sic). This submission is self-serving and is not substantiated by additional reliable or verifiable evidence.

[36] Determining whether a comment made by a decision-maker goes to the credibility of an applicant or to the sufficiency of the evidence provided is highly fact-specific and depends on the language used in the reasons, as well as the context of the reasons. As is the case on any aspect of a judicial review, the starting point is the decision itself and what it actually says. I accept that a decision-maker's conclusion that there is insufficient evidence to support an assertion can sometimes hide what is actually a veiled adverse credibility finding. However, the analysis first starts with the decision, and the answer ultimately rests on the wording and context of the decision.

[37] Here, a review of the Officer's GCMS notes reveals the following. The Officer determined that no weight should be given to Mr. Lv's post-interview letter as it did not contain the required details and depth on Mr. Lv's farm management experience and bluntly contradicted Mr. Lv's own previous statements made the day before at the interview, to the effect that he was not involved in the financial affairs of Pingnan Lvtian Farm. Apart from Mr. Lv's own late statement, the record is silent on Mr. Lv's self-anointed financial experience. There is nothing in the evidence to substantiate his personal affirmation in that respect; in fact, the record points in the opposite direction.

[38] I agree with the Minister that nothing turns on the term “self-serving” used by the Officer to describe the unsubstantiated post-interview letter claiming that Mr. Lv did in fact participate in the major financial decisions of the farm. When the Officer’s sentence is taken as a whole, and in the context of the Decision, it is clear that the Officer was describing the lack of probative value of the post-interview letter from Mr. Lv, a letter that did not address the concerns voiced at the interview but rather contradicted a previous statement made by Mr. Lv himself. Without a doubt, the Officer’s finding goes directly to the sufficiency of the evidence adduced by Mr. Lv to demonstrate his relevant work experience. The Officer’s reasoning is expressly worded in terms of sufficiency of evidence, and I detect no ground which could allow me to characterize it as an implicit or veiled credibility finding. A careful reading of the Officer’s notes confirms that, in the eyes of the Officer, the issue was one of insufficiency of evidence, not credibility. In my view, it was reasonable for the Officer to give little weight to Mr. Lv’s post-interview letter, when weighed against the balance of the evidence in the file and obtained at the interview, and the absence of details on the nature and depth of Mr. Lv’s role and responsibilities in the farm’s management.

(2) The distinction between credibility and sufficiency of the evidence

[39] The second problem with Mr. Lv’s complaints about the “self-serving” qualifier used by the Officer lies in the fact that Mr. Lv conflates the concept of sufficiency and probative value of the evidence with the concept of credibility of the evidence.

[40] I accept that a duty to provide an applicant with the opportunity to respond to an immigration officer’s concerns may arise when the officer raises doubt with the credibility, the

veracity, or the authenticity of the documentation provided by an applicant, as opposed to the sufficiency of the evidence provided. However, an adverse finding of credibility is not to be confused with a finding of insufficient probative evidence. As I stated in *Ibabu v Canada (Citizenship and Immigration)*, 2015 FC 1068 at para 35, "[a]n adverse finding of credibility is different from a finding of insufficient evidence or an applicant's failure to meet his or her burden of proof". It cannot be assumed that, in cases where an immigration officer finds that the evidence does not establish the applicant's claim, the officer has not believed the applicant (*Gao v Canada (Citizenship and Immigration)*, 2014 FC 59 at para 32). It is well-accepted that procedural fairness issues only arise when credibility findings are involved.

[41] The term "credibility" is often erroneously used in a broader sense of insufficiency or lack of persuasive value. However, these are two different concepts. A credibility assessment goes to the reliability of the evidence. When there is a finding that the evidence is not credible, it is a determination that the source of the evidence (for example, an applicant's testimony) is not reliable. The reliability of the evidence is one thing, but the evidence must also have sufficient probative value to meet the applicable standard of proof. A sufficiency assessment goes to the nature and quality of the evidence needed to be brought forward by an applicant in order to obtain relief, to its probative value, and to the weight to be given to the evidence by the trier of fact, be it a court or an administrative decision-maker. The law of evidence operates a binary system in which only two possibilities exist: a fact either happened or it did not. If the trier of fact is left in doubt, the doubt is resolved by the rule that one party carries the burden of proof and must ensure that there is sufficient evidence of the existence or non-existence of the fact to satisfy the applicable standard of proof. In *FH v McDougall*, 2008 SCC 53 [*McDougall*], the Supreme Court established that

there is only one civil standard of proof in Canada, the balance of probabilities: evidence "must be scrutinized with care by the trial judge" and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall* at paras 45-46). In all civil cases, it is up to the trier of fact to "scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred" (*McDougall* at para 49).

[42] Credible or reliable evidence is not necessarily sufficient, in and of itself, to establish that the facts set out therein meet the standard of proof of balance of probabilities. The trier of fact may decide to assign little or no weight to the evidence, and hold that the legal standard of proof has not been met. In the same vein, a presumption of truth or reliability cannot be equated with a presumption of sufficiency. Even if presumed credible and reliable, evidence from an applicant, or self-serving evidence, cannot be presumed to be sufficient, in and of itself, to establish the facts on a balance of probabilities. This is for the trier of fact to determine.

[43] When frailties have been highlighted in the evidence, it is appropriate for the trier of fact to consider whether the evidentiary threshold has been satisfied by an applicant. By doing so, the trier of fact does not question the applicant's credibility. Rather, the trier of fact determines whether the evidence provided, assuming it is credible, is sufficient to establish, on a balance of probabilities, the facts alleged (*Zdraviak v Canada (Citizenship and Immigration)*, 2017 FC 305 at paras 17-18). In other words, not being convinced by the evidence does not necessarily mean that the trier of fact disbelieves the applicant.

[44] In *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 [*Ferguson*] at paragraph 27, Justice Zinn provided a useful synopsis of the interplay between weight, sufficiency, and credibility of the evidence. His comments are particularly apposite to the case of Mr. Lv:

> [27] Evidence tendered by a witness with a personal interest in the matter may also be examined for its weight before considering its credibility because typically this sort of evidence requires corroboration if it is to have probative value. If there is no corroboration, then it may be unnecessary to assess its credibility as its weight will not meet the legal burden of proving the fact on the balance of probabilities. When the trier of fact assesses the evidence in this manner, he or she is not making a determination based on the credibility of the person providing the evidence; rather, the trier of fact is simply saying the evidence that has been tendered does not have sufficient probative value, either on its own or coupled with the other tendered evidence, to establish on the balance of probability, the fact for which it has been tendered. That, in my view, is the assessment of the officer made in this case.

[45] It is not only evidence that has passed the test of reliability (i.e., credible evidence) that may be assessed for weight and sufficiency. It is perfectly open to a trier of fact to assess the weight and probative value of evidence without considering first whether it is credible (*Ferguson* at para 26). This will occur when the trier of fact is of the view that the evidence is to be given little or no weight, even if it is found to be reliable. Similarly, the use of the words “self-serving” does not automatically signal the presence of a credibility finding. A self-serving statement refers to evidence from which the declarant receives some benefit. Evidence from a witness with a personal interest in the matter may be examined for its weight without implicating credibility, because this type of evidence typically requires corroboration if it is to have sufficient probative value to meet the threshold of balance of probabilities (*Ferguson* at para 27). The self-serving nature of a document can be a valid ground for assigning little weight to it. In such a case,

corroboration is needed not because there is an issue of credibility, but to meet the requirements of sufficient probative value and the standard of proof.

[46] In the case of Mr. Lv, the Officer found that there was insufficient objective evidence to prove, on a balance of probabilities, that Mr. Lv had the required experience in the management of a farm. The Officer neither believed nor disbelieved Mr. Lv's statement that he had the required work experience. She was simply unconvinced by what was before her as there was insufficient objective evidence to establish that Mr. Lv met the requirements of the self-employed class. In my view, there is no doubt that the Officer made her conclusions on the basis of insufficiency, not credibility. Not only does the Officer specifically mention the word in her notes, but an objective analysis of the reasons shows that this was indeed a case of insufficiency of the evidence. Here, as in *Ferguson*, the Officer was simply saying that the evidence that has been tendered by Mr. Lv does not have sufficient probative value, either on its own or coupled with the other tendered evidence, to establish on the balance of probabilities the fact for which it has been tendered. Such an assessment and weighing of evidence does not need to be put to an applicant and does not raise any issues of procedural fairness.

[47] The *Zmari* and *Hamza* cases do not assist Mr. Lv, and they are easily distinguishable on the facts. No interview had been conducted in either of those cases. More particularly, the *Zmari* case related to a pre-removal risk assessment application where it was found that the factual context outside the reference to the "self-serving" statement dictated, in and of itself, that an oral hearing should have been held. I further note that, in *Zmari*, no other opportunity had been given to the applicant to disabuse the visa officer of her concerns, and the decision failed to explain

why the self-serving letter deserved little weight. This is eminently different from the case of Mr. Lv.

IV. Conclusion

[48] For the above reasons, I must dismiss Mr. Lv's application for judicial review as no issue of procedural fairness arises in this case. I do not see any indication in the Officer's Decision suggesting that Mr. Lv's right to be heard and to respond to the case he had to meet has been breached. Furthermore, in all respects, the Officer met all procedural fairness requirements in dealing with Mr. Lv's application. Therefore, I am satisfied that the Officer's Decision is not vitiated by any error that would warrant the Court's intervention.

[49] Neither party has proposed a question of general importance for me to certify, and I agree there is none.

JUDGMENT in IMM-4482-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, without costs.

2. No serious question of general importance is certified.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4482-17
STYLE OF CAUSE:	WUXIAN LV v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 6, 2018
JUDGMENT AND REASONS:	GASCON J.
DATED:	SEPTEMBER 19, 2018

APPEARANCES :

Nkunda I. Kabateraine	FOR THE APPLICANT
David Joseph	FOR THE RESPONDENT

SOLICITORS OF RECORD :

Nkunda I. Kabateraine Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT