Federal Court  Cour fédérale

Date: 20190130

Docket: IMM-2622-18

Citation: 2019 FC 130

Ottawa, Ontario, January 30, 2019

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

LIANGSHUANG YANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

JUDGMENT AND REASONS

I. OVERVIEW

[1] This is one of five applications for judicial review brought under section 72(1) of the *Immigration and Refugee Protection Act* [IRPA] for a decision rendered by a an immigration officer [the Officer] of Immigration, Refugees and Citizenship Canada [IRCC] under section 14.1 of IRPA denying the Applicants permanent residency status for the Start-Up Business class [SUB]. On July 10, 2018, all of the applications for judicial review were consolidated.

[2] For the reasons that follow these applications for judicial review are dismissed.

II. BACKGROUND

[3] Liangshuang Yang [the Principal Applicant] (IMM-2622-18), Yang Zhang (IMM-2622-18), Jing Ma (IMM-2620-18), Xiaoli Liu (IMM-2619-18), Yuchen Huang (IMM-2625-18), Lihai Zhou (IMM-2623-18), and Chunyan Nan (IMM-2627-18) [collectively, the Applicants] all submitted permanent resident status applications for the SUB class under section 14.1 of IRPA. The Applicants allege they were to work for one of two projects established by Top Renergy Inc. [TRI]. The projects, Version Chat and Version Pay [the Version projects sometimes referred to in the documentation as VC and VP, respectively], work together to create a phone application providing a secured instant messaging application with built-in payment capabilities.

[4] On September 7, 2017, the Officer requested the business proposal for Version Chat from Huang and for Version Pay from Zhou. These proposals were prepared by Cycloids Inc. and submitted to the Officer the same day.

[5] The Officer requested an independent peer review of the Applicants' applications pursuant to section 11 of the *Ministerial Instructions Respecting the Start-up Business Class*, 2017-08-19 Canada Gazette Part I, Vol. 151, No. 33 to be conducted by an organization with expertise to the Applicant's entity.

[6] The peer review dated November 27, 2017 provided a number of negative conclusions concerning the applications. It concluded that the outline of the competitive marketplace was weak and high-level. Revenues were clearly projected but not rooted in any rational expectation of the market. There was only a tertiary overview of marketing and distribution strategy. There appeared to be no intellectual property brought to the project. The business case appeared frivolous without sufficient supporting documentation or evidence to warrant a typical venture capital investment. The entity had a management team with limited to no start-up experience. The business plans appeared very "cookie cutter".

[7] On April 19, 2018, the Officer sent a Procedural Fairness Letter [PFL] to each of the Applicants outlining the following concerns:

1. The Commitment Certificate identifies the Applicants as not essential;
2. TRI notes that the team is not "mature" and would partner with a more experienced company in India, raising doubts about whether they intend to bring their IP experience to Canada;
3. The business plan shows that the research performed into the competition and marketplace was very weak considering that major financial institutions already provide similar "Version Wallet" services in developed markets;
4. TRI is investing in a similar competing company, which is atypical of a venture capital investor; and
5. The applications show a lack of seriousness from the Applicants and their designated company.

[8] The Applicants responded to the PFL on May 16, 2018 with very similar response letters.

[9] On May 22, 2018, the Officer denied the Applicants' their permanent resident status application providing reasons that in some cases referred to insufficiencies in the provision of information:

1. There was no shareholder information or shareholder structure provided for the Version Chat business;
2. The Canada Revenue Agency [CRA] documents only list one owner/partner/director for the Version projects , who is not one of the Applicants;
3. While the May 3, 2018 letter from Cycloids Inc. explains that a beta version of the Version Chat project has been released to Google Play (and will soon be released for Version Pay) and that the work continues while the Applicants await their visa applications, the Applicants have not provided any evidence to show that the work is continuing in China;
4. There is no evidence to show that the software and platform were designed primarily by the Applicants with only some contribution from outside sources, such as Cycloids Inc.;
5. The Applicants are not listed as "essential";
6. The Applicants are not bringing IP experience to the business; and
7. The Commitment Certificate provided from TRI does not establish that Version Chat and Version Pay are "partners".

[10] Based on the above, the Officer found that the Applicants response did not "disabuse" the concerns raised in the PFL nor did they satisfy item 2(5) of the Ministerial Instructions. Therefore, the applications were denied.

III. RELEVANT LEGISLATION

[11] Subsections 11(1) and 14.1(1) of IRPA state:

Application before entering Canada	**Visa et documents**
11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11 (1)** L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
[…]	[…]
Economic Immigration	**Catégorie « immigration économique »**
14.1 (1) For the purpose of supporting the attainment of economic goals established by the Government of Canada, the Minister may give instructions establishing a class of permanent residents as part of the economic class referred to in subsection 12(2) and, in respect of the class that is established, governing any matter referred to in paragraphs 14(2)(a) to (g), 26(a), (b), (d) and (e) and 32(d) and the fees for processing applications for permanent resident visas or for permanent resident status and providing for cases in which those fees may be waived.	**14.1 (1)** Afin de favoriser l'atteinte d'objectifs économiques fixés par le gouvernement fédéral, le ministre peut donner des instructions établissant des catégories de résidents permanents au sein de la catégorie « immigration économique » visée au paragraphe 12(2) et, à l'égard des catégories ainsi établies, régissant les éléments visés aux alinéas 14(2)a) à g), 26a), b), d) et e) ainsi que 32d) et les frais d'examen de la demande de visa ou de statut de résident permanent, et prévoyant les cas de dispense de paiement de ces frais

[12] The Ministerial Instructions Respecting the SUB class states for item 2(5):

Improper purpose	**But irrégulier**
(5) An applicant is not to be considered a member of the start-up business class if they intend to participate, or have participated, in an agreement or arrangement in respect of the commitment primarily for the purpose of acquiring a status or privilege under the Act and not for the purpose of engaging in the business activity for which the commitment was intended.	**(5)** Ne peut être considéré comme appartenant à la catégorie « démarrage d'entreprise » le demandeur qui compte participer, ou qui a participé, à un accord ou à une entente à l'égard de l'engagement principalement dans le but d'acquérir un statut ou un privilège au titre de la Loi et non d'exploiter l'entreprise visée par l'engagement.

IV. ISSUES

[13] The issue on this application for judicial review is whether the Officer committed a reviewable error by ignoring evidence within the original Permanent Resident application and supporting documents, and basing the decision on erroneous findings of fact made in a perverse or capricious manner or without regard to the material before it?

V. STANDARD OF REVIEW

[14] The parties agree that the issues on this application for judicial review are to be reviewed on a standard of reasonableness. A reasonableness standard "is concerned mostly with the existence of justification, transparency, and intelligibility within the decision-making process" and "whether the decision falls within a 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.

VI. PARTIES' SUBMISSIONS AND ANALYSIS

A. *Preliminary Issue – Admissibility of Applicant's Further Memorandum of Argument*

[15] The Applicants have provided a further memorandum of argument and affidavit for the purpose of "updat[ing] the status of the two start up visa ventures […]" as, "[s]ince the original filing of the Application for Leave and Judicial Review, there have been significant developments with the two Start-up Venture projects […]" The Respondents argue that this further memorandum of argument and affidavit should be rejected or given no weight for two reasons: (1) it was submitted late; and (2) it raises facts that were not before the Officer.

[16] It is a well-established rule that the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the Board. In other words, evidence that was not before the Board and that goes to the merits of the matter before the Board is not admissible in an application for judicial review in this Court: *Assn. of Universities & Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at para 19.

[17] The Applicants' further memorandum of argument and affidavit provides evidence of the recent activities of the Version projects, focussing on what occurred after the applications for judicial review were issued in 2018. Therefore, this evidence was not before the Officer. As well, the evidence goes to the merits of the matter, as noted by the Applicants themselves:

> It is respectfully submitted that the above business expansions of VC and VP clearly establish that the ventures are viable, profitable, occupy a niche in the market and do not compete with each other.

[18] The Applicants' further memorandum of argument and affidavit is inadmissible as it raises evidence not before the Officer which go to the merits of the decision. As this is the case, I will only consider the Applicant's first memorandum of argument and reply.

B. *Did the Officer commit a reviewable error by ignoring evidence within the original Permanent Resident application and supporting documents, and basing the decision on erroneous findings of fact made in a perverse or capricious manner or without regard to the material before it?*

[19] The Applicant argues that the Officer did not consider the evidence in the Commitment Certificate for the Version projects and the Cycloids Inc. evidence, which includes a written statement, a confirmation letter, and a functional review and specifications report. The Respondent argues that the Applicants are simply inviting the court to re-weigh the evidence and do not raise any reviewable errors. The Respondent also notes that the Officer is not required to comment on all of the evidence in its decision.

[20] The Officer is presumed to have reviewed all of the evidence before the tribunal and is not required to mention every document before it: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62 at para 16.

[21] The Applicants claim three instances where the Officer states no evidence was provided:

1) no evidence was provided outlining the shareholder structure and shareholder information;

2) (2) no evidence was provided to show the continued efforts on the Version projects in China; and

3) (3) no evidence was provided to show that only parts of the software and platform development were outsourced.

[22] This does not appear to be a valid submission. In most cases, the Applicants failed to meet their onus of providing sufficient evidence to support their applications. While these issues are not raised in the PFL, the Officer's procedural fairness duty is lower when reviewing a visa application and no duty arises where the Officer has concerns regarding the deficiency in the application or supporting documents: *Kong v Canada (Citizenship and Immigration)*, 2017 FC 1183 at para 23- 24, *Sapojnikov v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 964 at para 26.

[23] For the first instance, the Applicants point to the Commitment Certificate dated June 6, 2017 where a proposed Articles of Incorporation was discussed; a Term Sheet dated June 3, 2017; and another Term Sheet dated April 7, 2017. Version Chat Inc. was incorporated on June 23, 2017. Therefore, all of these documents pre-date incorporation. Based on the Officer's decision where he noted the incorporation date of Version Chat Inc., it is clear the Officer was focused on the Articles of Incorporation used to incorporate the business not on a proposal. So, it is reasonable that the Officer did not rely on this evidence given that the company was incorporated a few weeks after submitting the proposal and roughly a year before the decision was made.

[24] For the second instance, the Applicants' rely on an excerpt from the Cycloids Inc. letter and the Principal Applicant's affidavit explaining that the Version Chat would liaise with the company in China. The evidence in the Cycloids Inc. letter was repeated by the Officer in the decision (and, therefore, considered) and the Principal Applicant's affidavit was sworn on July 26, 2018, roughly two months after the May 22, 2018 decision was rendered (and, therefore, not

before the Officer). Therefore, it was reasonable for the Officer to note that there was no evidence to support this proposition.

[25] The Applicants also argue that there was evidence to support the fact that Version Chat was partnered with Version Pay. The Officer noted that this partnership was not disclosed in the Commitment Certificate provided by TRI. In addition it does not appear that there is any research carried out for Version Pay in the record. The Applicants rely on Version Pay being given a business license by FINTRAC, however there is no mention of any of the Applicants in this license. The Applicants do not address this missing information from the Commitment Certificate but rather pull information from the business proposal. This is not sufficient to show a reviewable error as the Officer questioned the Commitment Certificate, not the business proposal.

[26] For the third instance, the Applicants also point to the May 3, 2018 letter from Cycloids Inc. which states that all of the intellectual property rights belong to Version Chat Inc. These are only statements without support, as owning intellectual property does not mean that the company developed software. As such, this statement does not address the Officer's concern that the intellectual property was developed by another company. It was reasonable for the Officer to not rely on this evidence as it does not answer the concern.

[27] In addition, it does not appear that the Applicants responded to the concern of the Officer that the CRA documents only have one owner/partner/director of Version Chat listed who is not

one of the Applicants. Similarly, there is no evidence that the Applicants were bringing IP experience to the business.

[28] Looking to the Applicants' reply, the Applicants raise other documents and issues that they allege were not considered by the Officer:

1. The Applicants argue that the "maturity" concern was explained in their written submissions responding the PFL;
2. The Applicant argues that Version Chat and Version Pay do not compete but rather work symbiotically together; and
3. The Applicants note that the issue of weak research into the issues of competition and marketplace was addressed in their written response to the PFL.

[29] However, all of these points of issue were raised in the PFL but do not appear in the decision itself. Therefore, the Officer did not rely on these issues to deny the applications.

[30] The Court concedes that the Officer may have erred in relying upon the Applicants not being listed as "essential" in the commitment form, as they had received confirmation that there is no requirement that the designated entity name any essential applicants. This advice appears to deprive the particular item of any utility. In addition, there does not appear to be a warning that the form be answered truthfully, which would put aside any issue as to how the "essential" question should be answered. The Respondent also notes that the Applicants argue that the TRI made this decision as a strategy, without, however, providing the Officer with the basis of the strategy. I would think that designating all Applicants as non-essential, when combined with a fairly inadequate statement concerning the work history of the Applicants, to be indicative of a

lack of seriousness and further supports the conclusion that none of the Applicants were bringing much value to the project.

[31] Even if the Officer's decision was affected by the confusion over the Applicants designating themselves as non-essential, it is insufficient as a ground to overcome the remaining evidence supporting the Officer's grounds and other insufficiency evidence in the decision making process to refuse the applications. Accordingly, the Officer's decision was a reasonable.

VII. CONCLUSION

[32] The application for judicial review is dismissed. No questions are certified for appeal.

JUDGMENT in IMM-2622-18

THIS COURT'S JUDGMENT is that:

1. The style of cause is hereby amended to reflect the correct Respondent, the Minister of Citizenship and Immigration;

2. The application for judicial review is dismissed. No questions are certified for appeal.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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