Federal Court Cour fédérale

Date: 20190917

Docket: IMM-5634-18

Citation: 2019 FC 1175

Ottawa, Ontario, September 17, 2019

PRESENT: Madam Justice McDonald

BETWEEN:

NEMIKA OZGE OZBILEN BELEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a citizen of Turkey who applied for a permanent resident visa under the self-employed class. She plans to work as an interior designer in Toronto and is currently enrolled in a post-graduate program in design management at George Brown College in Toronto. In support of her application, the Applicant filed extensive information about her educational background and her relevant employment experience.

[2] Her application was refused on October 20, 2018, as the Visa Officer (Officer) concluded that she did not provide sufficient evidence of her intention and ability to be self-employed in Canada.

[3] For the reasons that follow, this judicial review is granted.

Relevant Legislation

[4] Subsection 12(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] states:

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

[5] Subsection 100(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*] states:

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).

[6] Subsection 88(1) of the *IRPR* provides:

(a) a self-employed person, other than a self-employed person selected by a province, 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…	a) S'agissant d'un travailleur autonome autre qu'un travailleur autonome sélectionné par une province, 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 …

Issue and Standard of Review

[7] The Applicant raises a number of issues with the decision, however, this judicial review is being granted solely on the basis of a breach of procedural fairness. I therefore decline to address the other issues.

[8] Whether the Applicant was afforded procedural fairness, in particular, whether the Officer was required to grant the Applicant an opportunity to respond by way of an interview or a procedural fairness letter, is reviewed on the standard of correctness (*Canada (Citizenship and Immigration) v Khosa,* 2009 SCC 12 at para 43).

Analysis

[9] The Applicant argues that the Visa Officer breached her right to procedural fairness by not providing her the opportunity to respond to his obvious concerns. The Applicant points to Immigration, Refugees and Citizenship Canada's operational instructions and guidelines in *OP 8: Entrepreneur and Self-Employed*, 5.14 which states:

> When the officer has concerns about eligibility or admissibility, the applicant must be given a fair opportunity to correct or contradict those concerns. The applicant must be given an opportunity to rebut the content of any negative provincial assessment that may influence the final decision. The officer has an obligation to provide a thorough and fair assessment in compliance with the terms and spirit of the legislation and procedural fairness requirements.

[10] This is consistent with *Yazdanian v Canada (Minister of Citizenship and Immigration)*, [1999] 170 FTR 129 where the Court states at paragraph 18:

> While I agree with the Respondent that the Applicant has the onus to provide sufficient information to the Visa Officer to support his application, when the Visa Officer has a <u>specific concern</u> that could impact negatively on the application, fairness requires that the Applicant be given an opportunity to respond to her concern.

[11] Courts have found that the duty of procedural fairness owed by Visa Officers is on the low end of the spectrum, and that the onus is on the Applicant to establish she meets the legislative requirements by providing sufficient evidence in support of her application (*Hamza v Canada (Minister of Citizenship and Immigration)* 2013 FC 264 at paras 22-23 [*Hamza*]).

[12] Here, the Officer, after noting the appropriate legislative provisions, makes the following finding without reference to any of the evidence:

> I am not satisfied that you meet the definition of a self-employed person set out in subsection 88 (1) of the regulations because based on the evidence submitted I am not satisfied that you have the ability and intent to become self-employed in Canada.

[13] Based upon this summary finding of the Officer, it is not possible, even on a generous reading of the Officer’s decision, to ascertain whether the Applicant’s evidence was given any

consideration. The Officer's decision makes no reference to the Applicant's evidence of her education, work experience, and financial abilities to become self-employed in Canada. It is not clear what aspect of the Applicant's evidence the Officer found deficient.

[14] Furthermore, in the event the Officer had concerns of credibility with respect to the evidence provided by the Applicant, the Officer had a duty to provide the Applicant with the opportunity to respond (*Hamza* at para 25).

[15] The Respondent relies upon a number of cases to argue that the Applicant was owed no greater procedural fairness and that it was her obligation to file sufficient evidence in support of her application. However, the cases the Respondent relies upon can be distinguished from the facts of this case. For example, in *Nima Jafari v Canada (Minister of Citizenship and Immigration)* (July 24, 2019, IMM-6099-18, Fed. Court), the Applicant was asked to provide a detailed business plan. Further, in *Tollerene v Canada* (2015 FC 538) the Applicant was given an opportunity to provide additional information. Additionally, in *Wei v Canada (Citizenship and Immigration),* (2019 FC 982) the Applicant was afforded an interview.

[16] In this case, the Applicant was never asked to file a business plan, she was not asked to file additional documents, and she was not asked to attend an interview to address any credibility concerns. In fact, on the face of the decision, it is impossible to discern what part or parts of the Applicant's evidence were insufficient.

[17] Although the Respondent urges an interpretation of the Officer's decision which assumes all of the Applicant's evidence was considered, in this case that is not possible. While it is appropriate to show deference in some cases, here, there is simply no indication that the Officer turned his mind to the evidence and made a proper (or any) assessment.

[18] This judicial review is therefore granted and the matter is remitted for redetermination by a different officer.

JUDGMENT in IMM-5634-18

THIS COURT'S JUDGMENT is that:

1. This judicial review is granted and the matter is returned for redetermination by another officer; and

2. There is no question for certification.

"Ann Marie McDonald"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mario D. Bellissimo	FOR THE APPLICANT
Rachel Hepburn Craig	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bellissimo Law Group Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Department of Justice Toronto, Ontario	FOR THE RESPONDENT