Federal Court  Cour fédérale

Date: 20200629

Docket: IMM-4805-19

Citation: 2020 FC 734

Ottawa, Ontario, June 29, 2020

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

NGOC THIEN PHUONG LE
AND VIET NGA LE

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Ngoc Thien Phuong Le [Ms. Le] and Viet Nga Le [Mr. Le], seek judicial review of two decisions of an Officer of Immigration, Refugees and Citizenship Canada [Officer] dated July 19, 2019 denying their separate applications for permanent resident visas through the Start-up Business Class [SUBC].

[2] This is the second time the Applicants have sought judicial review of the denial of their applications for permanent residence under the SUBC visa program. After leave was granted by this Court to seek judicial review of the decisions of the previous officer [First Officer], an agreement was reached between the parties to refer the matters back for reassessment by a different officer, but without any terms being imposed.

[3] The Officer came to the same conclusion as the First Officer and determined the Applicants' participation in their proposed venture was primarily for the purpose of acquiring a status or privilege under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and not for business purposes.

[4] Ms. Le was chosen as the lead applicant for the purpose of the permanent resident visa applications. After her application was refused by the Officer, Mr. Le's application was automatically rejected. The applications for leave and judicial review of Mr. Le in Court File No. IMM-4805-19 and Ms. Le in Court File No. IMM-4804-19 were consolidated under Court File No. IMM-4805-19 by Order of Mr. Justice William Pentney on October 2, 2019. This decision applies to the consolidated proceedings.

[5] For the reasons that follow, the applications for judicial review are dismissed.

II. **Background**

A. *The Start-up Business Class*

[6] Subsection 12(2) of the IRPA allows foreign nationals to acquire permanent residence in Canada through their selection as members of the economic class of immigration.

[7] Subsection 14.1(1) of the IRPA allows the Minister of Citizenship and Immigration [Minister] to give instructions establishing a class of permanent residents as part of the economic class referenced in subsection 12(2).

[8] The Minister established the SUBC as a class of permanent residents. Subsection 2(1) of the *Ministerial Instructions Respecting the Start-up Business Class, 2017,* (2017) C Gaz I, 3523 [*Ministerial Instructions*] states that the SUBC consists of foreign nationals who have the ability to become economically established in Canada and who meet the *Ministerial Instructions*' requirements.

[9] To qualify for the class, an applicant must have: (a) obtained a commitment from a business incubator, angel investor group, or venture capital fund designated in Schedules 1, 2, and 3 of the *Ministerial Instructions*; (b) attained a particular language proficiency; (c) a certain amount of transferable and available funds; and (d) a qualifying business: *Ministerial Instructions*, s 2(2).

[10] Subsection 14.1(7) of the IRPA requires Officers to comply with the *Ministerial Instructions* while processing an applicant's permanent resident visa application. It is the applicant's responsibility to demonstrate that they meet the requirements of the *Ministerial Instructions*: *Bui v Canada (Citizenship and Immigration)*, 2019 FC 440 at para 42 [*Bui*].

[11] Officers may request a peer review panel to independently assess the commitment between an applicant and the designated entity: *Ministerial Instructions*: ss 11(1)-(2). The peer review panel must provide the Officer with its independent assessment of whether the entity that made the commitment assessed the applicant and the applicant's business in a manner consistent with industry standards, and whether the terms of the commitment are consistent with those standards: *Ministerial Instructions*, s 11(3). The peer review panel's assessment is not binding on the Officer: *Ministerial Instructions*, s 11(4).

[12] An applicant is not to be considered a member of the SUBC if they intend to participate, or have participated, in an agreement or arrangement with a designated entity primarily for the purpose of acquiring a status of privilege under the IRPA and not for the purpose of engaging in the business activity for which the agreement or arrangement was intended: *Ministerial Instructions*, s 2(5).

B. *The Applicants' Applications for Permanent Residence*

[13] The Applicants are citizens of Vietnam. Their proposed venture was Mekso Energy Ltd. [Mekso], which was to produce solar power solutions in Vietnam for industrial and commercial customers. Mekso was incorporated in British Columbia in November 2016.

[14] An entity designated by the Minister, Empowered Startups Limited [Empowered], assisted the Applicants with their venture as an incubator. The commitment from the incubator confirmed that the Applicants' business was currently participating in or had been accepted into the incubator's program and that the incubator had performed a due diligence assessment of the Applicants and the Applicants' business: see *Ministerial Instructions*, ss 6(4)(*b*), 6(4)(*i*).

[15] On February 21, 2017, the Applicants submitted their applications under the SUBC program.

C. *First Officer's Decision*

[16] On August 10, 2017, the First Officer requested a peer review of Empowered's due diligence. The Canadian Acceleration and Business Incubation Association [CABI] performed the peer review on August 24, 2017, and CABI prepared a report setting out the following concerns: (i) it was not clear why Mekso had to be incorporated in Canada, (ii) it was not clear what Empowered's role in the proposed venture would be, and (iii) there was a lack of transparency between the Applicants and Empowered, and their arrangement was atypical in the Canadian accelerator and incubator industry.

[17] On November 9, 2017, the First Officer sent procedural fairness letters to the Applicants. After reviewing the Applicants' response contesting the conclusions of the peer review report, the First Officer denied their permanent resident visa applications on February 19, 2018.

[18] As stated earlier, the parties reached an agreement to return the Applicants' applications for reassessment by a different officer.

D. *Impugned Decisions*

[19] On May 30, 2019, the Officer sent a procedural fairness letter, along with a copy of CABI's previous peer review report. After reviewing the Applicants' response, the Officer denied their permanent resident visa applications on July 19, 2019.

[20] The Officer determined the Applicants did not demonstrate that they participated in their arrangement with Empowered for the primary purpose of engaging in the business activity for which their arrangement was intended; rather the primary purpose of their venture was acquiring a status or privilege under the IRPA.

[21] The following reasons were provided by the Officer. First, the Applicants spent only two weeks in Canada, which was contrary to their claim that there were urgent business reasons for them to come to Canada, and that the business would be working with its incubator in Vancouver. Second, Mekso failed to sign any partnership agreements, which was contrary to the Applicants' claim it was working with entities in the Canadian solar energy field. Third, there was a lack of evidence that Mekso acquired customers willing to pay for its services or generate revenue. Fourth, there was a lack of evidence that Mekso diligently pursued a project with Jia Hsin/Adidas. Fifth, the Officer concluded that the Applicants' contention that they cannot restart their "Go-Forward plan" until they land in Canada seemed "inconsistent with the actions of a person whose primary intent is to develop the business described in the commitment certificate."

III. **Analysis**

A. *Procedural Fairness*

[22] The Applicants submit that there was a breach of procedural fairness in this case because the Officer relied on a peer review report from a discredited panel.

[23] It is well established that questions of procedural fairness are reviewed on a standard of correctness. However, it is not enough to simply assert procedural unfairness. The Court must first be satisfied that a procedural fairness issue in fact exists. This involves a consideration of what is alleged to have constituted the unfairness.

[24] The Applicants do not suggest that they did not have an opportunity to respond to the peer review report. They argue instead that they should not have been obliged to respond to the peer review report at all. They submit that the Officer should have discarded the report in its entirety as it was the result of an improper process, and coming from an organization whose status within the SUBC program was removed from it by the Minister.

[25] In my view, the Applicants' complaint relates to the reasonableness of the Officer's decisions, and not to the Officer's process in reaching the decisions. The Officer was under a duty to consider all the material on the record and to provide the Applicant an opportunity to respond to concerns raised in the peer review report. The Applicants responded with comprehensive submissions, arguing that the report emanated from a wholly inadequate process, from an organization no longer recognized by the Ministry, which the incubator had sued

claiming bias and other causes of action. The Applicants have failed to establish any unfairness by the Officer in reassessing their applications.

B. *Reasonableness of the Decisions*

[26] The Officer's decisions themselves are reviewable on a standard of reasonableness. A reasonable decision is based on internally coherent reasoning, and it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 84-86, 99-101.

[27] The Applicants submit that the Officer overreached in finding fault with the applications and showed a fundamental misunderstanding of the SUBC. According to the Applicants, the decisions denying their application were arbitrary and unreasonable. For the reasons that follow, I disagree.

[28] First, the Applicants submit it was unreasonable for the Officer to make a negative inference from the short length of time (two weeks) they spent in Canada on their one-year work permit, as they are not obligated (through the SUBC) to obtain a work permit.

[29] This is not a reviewable error. The Officer acknowledged that there are no work permit obligations on the Applicants. However, the Officer was concerned that there was a "big discrepancy between what was stated in the commitment certificate […] and the applicant's actions once the work permit was issued" (that is, that the Applicants' positions were full-time positions in Vancouver, that there were urgent business reasons for the Applicants to come to

Canada, and that the Applicants were to undergo a one-year incubation program in Vancouver). It was not unreasonable for the Officer to conclude that this discrepancy demonstrated the Applicants' were working with Empowered to acquire a status or privilege under the IRPA rather than for the purpose of engaging in the business activity for which their arrangement was intended.

[30] Second, the Applicants claim that the Officer disregarded evidence regarding their lack of contracts in the solar energy field in Canada. In particular, the Officer makes no mention in the decisions to a letter from Mr. Paul Girodo with Empowered dated May 2, 2019 stating Mekso could not "make significant further investments" and Empowered could not "suggest the Company [Mekso] make any commitments with those in our network" until the Applicants' immigration status was resolved.

[31] While the Officer did not specifically refer to Mr. Girodo's letter, I am not satisfied that it was ignored. The Officer states in the decisions that the Applicants' response to the second procedural fairness letter was reviewed. The Officer addressed the Applicants' argument that the "issues with the processing of the present application (PFL, 1st refusal, judicial review, reopening of file) and her lack of status in Canada, it was reasonable to stop the development of Mekso"—which was essentially Mr. Girodo's explanation. The Officer responded to the argument, asserting "many foreign nationals who own Canadian businesses and come to Canada as business visitors or on work permits when they need to work on their Canadian business." The Officer also acknowledged that there was no evidence that the Applicants lack of status was the

reason business partners were unwilling to work with them. Consequently, I am satisfied that the Officer was alert and sensitive to all of the material submitted by the Applicants.

[32] Third, the Applicants assert it was unreasonable for the Officer to require the Applicants to have paying customers or revenue. The Applicants argue that the Officer imposed obligations that the *Ministerial Instructions* do not demand.

[33] Again, this is not a reviewable error. The Officer agreed with the Applicants that there was no obligation to have paying customers or generate revenue. The lack of paying customers and revenue was not the reason to refuse the applications for permanent residence. According to the Officer, this factor suggested that the Applicants had not actively pursued the venture described in the commitment certificate. As the Officer was assessing the primary purpose of the Applicants' arrangement with Empowered, it is not an unreasonable inference to reach.

[34] Fourth, the Applicants allege that the Officer's concern regarding the lack of diligence in pursuing the Jia Hsin/Adidas project was unreasonable. They assert that the Officer criticized them for not diligently pursuing the Jia Hsin/Adidas project in Vietnam, while also criticising them for failing to bring their business to Canada.

[35] I am not satisfied the Officer was placing the Applicants in a catch-22 situation. The Officer's criticisms regarding the Applicants' failure to bring their business to Canada comes from the discrepancy between the Applicants' actions and their commitment certificate. That criticism, and the criticism related to the failure to diligently pursue the Jia Hsin/Adidas project,

come from the central contention that the Applicants' actions are inconsistent with those of persons whose primary intent is to develop the business described in the commitment certificate. It is an observation that was within the range of reasonable outcomes.

[36] Fifth, the Applicants assert the Officer's concerns regarding the resumption of the Go-Forward plan only after the Applicants land in Canada were unreasonable. The Officer concluded that there was no evidence that the Applicants' potential business partners refused to work with them because of the Applicants' lack of status in Canada, and that the Applicants were able to continue to develop their business despite their lack of status. The Applicants state that the stoppage in the development of their business was "forced", and that the Officer disregarded an email from Mehrdad Moaellem discussing that stoppage and their lack of status.

[37] Once again, I can detect no error in the Officer's findings. Prof. Moaellem simply stated in his email that "[i]t is very difficult to allocate researchers to the project without knowing the anticipated start date". The Officer properly reviewed options that were available to the Applicants to embark on their project without status. It was open to the Officer to question why the Applicants failed to pursue any of those options and conclude that the primary purpose of their venture was the acquisition of some status or privilege under the IRPA.

IV. **Conclusion**

[38] For the above reasons, I am not satisfied that the Officer's decisions are unreasonable. Therefore, the applications for judicial review are dismissed.

[39] There are no questions for certification.

JUDGMENT IN IMM-4805-19

THIS COURT'S JUDGMENT is that the applications for judicial review are dismissed.

"Roger R. Lafrenière"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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