Federal Court Cour fédérale

Date: 20201207

Docket: IMM-4836-19

Citation: 2020 FC 1126

Ottawa, Ontario, December 7, 2020

PRESENT: Mr. Justice McHaffie

BETWEEN:

HOANG BAO TRAN NGUYEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Hoang Bao Tran Nguyen's application for permanent residence as a member of the start-up business class was refused. The visa officer concluded that her primary purpose in participating in an agreement with a business incubator was acquiring a status or privilege under the *Immigration and Refugee Protection Act*, SC 2001 c 27 [*IRPA*] and not engaging in the business activity that was the subject of a commitment by the incubator.

[2] This is the second application for judicial review by Ms. Nguyen. Justice LeBlanc, then of this Court, found that an earlier refusal of Ms. Nguyen's application on the same basis was unfair since the first visa officer had not given Ms. Nguyen notice of extrinsic evidence they relied on: *Nguyen v Canada (Citizenship and Immigration)*, 2019 FC 439 [*Nguyen #1*] at paras 1, 29–32. Ms. Nguyen contends that the second visa officer's decision was unfair and unreasonable because it relied on issues that were not raised by the first officer, and that did not reasonably support an improper purpose finding.

[3] I am not persuaded that the visa officer's decision was unfair or unreasonable. The first officer's analysis of the application did not bind or constrain the second officer, who was required to undertake their own assessment of the application as a whole. They fairly raised their concerns, providing Ms. Nguyen with an opportunity to comment. The grounds given by the officer and challenged by Ms. Nguyen were reasonably related to the determinative issue of improper purpose, notwithstanding Ms. Nguyen's arguments that issues such as the fees paid to the business incubator or the amount of progress made in the development of the business were not expressly part of the *Ministerial Instructions* applicable to the program at the time.

[4] The application for judicial review is therefore dismissed.

II. Issues and Standard of Review

[5] Ms. Nguyen raises three issues on this application:

A. Was it unfair for the visa officer to identify concerns about the fees paid to the start-up incubator or Ms. Nguyen's limited progress in her business when those issues had not been raised by the first visa officer assessing the file?

B. Did the visa officer err in relying on concerns about the fees paid to the start-up incubator or Ms. Nguyen's limited progress in her business in determining that Ms. Nguyen's primary purpose in entering into the start-up agreement was acquiring a status or privilege under the *IRPA*?

C. Do special circumstances justify an award of costs in this case?

[6] As the parties agree, the first issue is a question of fairness that is to be reviewed on a standard best reflected in the correctness standard, although strictly speaking it does not involve the application of a standard of review: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Nguyen #1* at para 24. In assessing allegations of procedural unfairness, the Court considers whether the procedure was fair in all the circumstances: *Canadian Pacific* at para 54.

[7] The second issue goes to the merits of the visa officer's refusal of the application, which the parties agree is to be assessed on the reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25. Reasonableness

review requires the Court to "consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified": *Vavilov* at para 15. A reasonable decision is one "based on an internally coherent and rational chain of analysis" and that is "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at paras 85, 90, 99, 105–107.

[8] As Ms. Nguyen notes, the majority in *Vavilov* confirmed that while reasonableness review starts with the principle of restraint and respect for the role of administrative decision makers, it is not a "rubber-stamping" process and remains a robust form of review: *Vavilov* at paras 13, 75. Nevertheless, it is not the Court's role to ask what decision it would make in the circumstances, but to consider whether the decision made by the decision maker, including both the rationale and the outcome, was reasonable: *Vavilov* at para 83.

III. Analysis

A. *It was not Unfair for the Visa Officer to Consider and Rely on New Issues*

(1) The start-up business class program and procedural fairness requirements

[9] The nature of the start-up business class program is described by Justice LeBlanc at paragraphs 2 to 7 of *Nguyen #1* and I need not repeat that discussion. At the time, the program was governed by instructions given by the Minister under section 14.1 of the *IRPA*, namely the *Ministerial Instructions Respecting the Start-up Business Class, 2017*, *Canada Gazette Part I*, Vol 151, No 33 at p 3523. The program was subsequently incorporated into sections 98.01 to 98.13 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*], but the

parties agree that the *Ministerial Instructions* applied to Ms. Nguyen's application and its evaluation.

[10] Subsection 2(5) of the *Ministerial Instructions* specifies that an applicant is not a member of the start-up business class if their participation is primarily for the purpose of acquiring a status or privilege under the *IRPA*, rather than for engaging in the identified business activity:

Improper purpose	**But irrégulier**
2 (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.	**2 (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.

[11] As Justice LeBlanc noted in *Nguyen #1*, the level of procedural fairness owed by a visa officer in respect of an application of this nature is on "the lower end of the spectrum": *Nguyen #1* at para 27; *Sapojnikov v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 964 at para 26. Nonetheless, a visa officer has an obligation to inform an applicant and provide them an opportunity to respond to any concerns that do not arise directly from the requirements of the *IRPA* or the applicable program: *Bui v Canada (Citizenship and Immigration)*, 2019 FC 440 at paras 26–29, 33; *Sapojnikov* at para 26; *Nguyen #1* at para 28.

(2) First refusal of Ms. Nguyen's application quashed by this Court

[12] Ms. Nguyen's start-up business was designed to develop a mobile software application that would allow parents, daycares, and nursery schools in member states of the Association of Southeast Asian Nations (ASEAN) to connect with each other to permit parents to select daycare and schooling options for their children. Ms. Nguyen pitched this idea to Empowered Startups Ltd., an entity designated as a business incubator under paragraph 4(*a*) of the *Ministerial Instructions.* Empowered extended an offer to Ms. Nguyen to participate in their program, issued a "Start-Up Business Class Commitment Certificate" in a form provided by Immigration, Refugees and Citizenship Canada (IRCC), and the parties signed a term sheet in April 2017.

[13] Ms. Nguyen's application was first considered by a visa officer in late 2017 and into 2018. During this process, the officer referred the proposal to peer review pursuant to section 11 of the *Ministerial Instructions*, and received a report from a peer review panel. The visa officer subsequently issued a procedural fairness letter identifying a number of concerns, including issues raised in the peer review report, and Ms. Nguyen was given an opportunity to respond. The visa officer refused the application in July 2018 because they were not satisfied that Ms. Nguyen participated in the business venture for the purpose of engaging in the business activity for which the commitment was intended.

[14] Justice LeBlanc quashed that refusal in April 2019, on the basis that the visa officer had unfairly relied on evidence regarding similar software applications on the market without putting

these concerns to Ms. Nguyen and giving her an opportunity to respond: *Nguyen* at paras 26–29. He therefore remitted the matter for determination by a different visa officer.

(3) Second refusal of Ms. Nguyen's application for different reasons

[15] Shortly thereafter, a second visa officer sent a letter giving Ms. Nguyen an opportunity to submit any additional information. In early May 2019, Ms. Nguyen sent in a letter from Empowered reconfirming their commitment to continue to incubate, mentor, and pursue growth goals with Ms. Nguyen and her start-up company. In late May, the new visa officer sent a second procedural fairness letter. The letter raised concerns that included the lack of progress on the business, and a note from the initial peer review panel that Ms. Nguyen "has agreed to pay $300,000 which is not normal course of business in Canada."

[16] Neither the lack of progress nor the $300,000 fee had been raised as issues by the first visa officer.

[17] Ms. Nguyen's response to this second procedural fairness letter satisfied some of the visa officer's concerns. However, the visa officer remained concerned about the lack of progress and the $300,000 fee being outside the normal course of business. This led the officer to again refuse Ms. Nguyen's application on the basis that she was excluded by subsection 2(5) of the *Ministerial Instructions*, since her primary purpose in participating in the agreement with Empowered was acquiring a status or privilege under the *IRPA* rather than engaging in the business activity for which the commitment was intended.

(4) The second refusal was procedurally fair

[18] Ms. Nguyen argues that it was unfair for the second visa officer to base their decision on grounds that were raised for the first time after the initial decision was made and then quashed by this Court. She argues that this amounts to "cherry-picking" new problems on which to refuse the application, even though there was no new information and the first officer clearly did not have a concern with either the fee or the degree of progress. I disagree.

[19] When this Court quashes a decision and sends a matter back for redetermination by a different officer, the new officer's role is to make a determination on the basis of their assessment of the matter in its entirety. That assessment is not limited to issues that the prior officer considered to be "outstanding." As Justice Rothstein, then of this Court, put it: "[t]here is nothing wrong with a visa officer having regard to information in prior applications and interviews of the applicant provided the visa officer decides the case on the basis of the evidence before him or her and does not consider himself or herself bound or fettered by previous decisions" [emphasis added]: *Jie v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8833 at para 7. Relying on *Jie*, Justice Diner noted the "importance of reconsiderations being unconstrained by the thoughts of previous decision makers": *Abusaninah v Canada (Citizenship and Immigration)*, 2015 FC 234 at para 46.

[20] The fact that a second decision maker makes a new independent decision on a redetermination may mean that they raise or rely on issues that were not raised or relied on by the first decision maker in the decision that was quashed. This possibility is inherent in the

decision making process, particularly where a multi-factorial determination such as an improper purpose assessment is at issue. It does not create an unfairness provided that, as here, the applicant has had the opportunity to address the issues raised by the second decision maker.

[21] Ensuring that a subsequent administrative decision maker is not bound or fettered in their decision making on redetermination is sufficiently important that this Court exercises caution in the directions or instructions it issues in sending a matter back for redetermination: *Canada (Citizenship and Immigration) v Yansane*, 2017 FCA 48 at paras 18–19. Justice LeBlanc issued no such directions or instructions: *Nguyen* at para 32.

[22] I appreciate the concern raised by Ms. Nguyen that she feels she was subject to a moving target, and that she could potentially become engaged in a never-ending process in which different decision makers raise a series of different concerns. However, I cannot accept that this has created an unfairness in the process in this case. This Court is able to take into account the potential risk of multiple decisions and judicial review applications turning into a "boomerang" or "game of ping-pong," and can take steps where this may arise to avoid further recurrence: see, *e.g.*, *Singh v Canada (Citizenship and Immigration)*, 2019 FC 1633 at paras 21–22, 35; *Vavilov* at para 142. However, this concern does not arise every time a second decision maker makes a decision based on different grounds than those that underlay the first decision.

[23] I similarly cannot accept the other argument Ms. Nguyen raises under the rubric of procedural fairness. Ms. Nguyen argues that the process leading to the peer review report was unfair since Empowered was not given a chance to respond to issues identified in the report,

including the $300,000 payment, before the report was issued. Ms. Nguyen points in particular to IRCC program documents published relating to the peer review process. Those documents state that if the peer review panel has doubts or concerns about the due diligence undertaken by the incubator, they "must address these with a representative from the [incubator] and provide them with an opportunity to respond verbally." Ms. Nguyen argues that this did not happen in this case with respect to the fee, and that this unfairness tainted the report, and thus the application process.

[24] This argument cannot succeed. The decision under review is the refusal of Ms. Nguyen's application, and the issue is whether the process was fair to Ms. Nguyen, not to Empowered. The peer review report is expressly not binding on the visa officer by operation of subsection 11(4) of the *Ministerial Instructions*. As the visa officer stated in their notes in the Global Case Management System (GCMS) underlying the decision, "the fact that [Ms. Nguyen] agreed to pay the designated entity $300,000 is a fact." That there may have been flaws in the peer review process does not render any decision that considers the fee unfair, since Ms. Nguyen was expressly given the opportunity to address the visa officer's concerns, including the concern about the fee paid to Empowered.

[25] Justice LeBlanc faced and rejected a similar argument in *Bui* at paragraphs 33–34:

> Even if the peer review process was flawed, ultimately, the decision to grant the visa application or not lay with the Officer. Hence, the Officer was under a duty, depending on the circumstances, to let the Applicant know of their concerns. As the Officer's concerns arose from a requirement under the *Ministerial Instructions*, namely that an applicant must not enter into a commitment for the purpose of obtaining a status or privilege under the Act (*Ministerial Instructions* s 2(5)), one could argue

> that the Officer was not obliged to put this to the Applicant. However, in the present case, the Officer did raise this concern with the Applicant.
>
> The terms in which this concern was expressed in the Procedural Fairness Letter meet the required threshold insofar as they permit the Applicant to know the case to meet and to understand why the Officer was inclined to deny his visa application.
>
> [Emphasis added.]

[26] I am not convinced that, as Ms. Nguyen argues, Justice LeBlanc's decision in *Bui* "misses the mark" on this issue. She argues that she should never have been required to respond to the peer review report given the improper process through which it was created. Again, however, Ms. Nguyen was ultimately not required to respond to the peer review report itself. She was required, or at least given the opportunity, to respond to concerns held by the visa officer in respect of her application for permanent residence. That these concerns were first raised or flagged in the peer review report does not change the fact that it is the visa officer's concerns that are ultimately being raised and addressed.

[27] I note that, while not determinative of the issue, the affidavit filed by Ms. Nguyen's former counsel on this application for judicial review indicates that their response to the visa officer's fairness letter was undertaken after consultation with both Ms. Nguyen and Empowered. To the extent that Empowered was able to provide information regarding their fee being in accordance with industry standards, they had the opportunity to do so in response to the fairness letter, attenuating any concerns about the fairness of not being able to address that issue with the peer review panel.

[28] I therefore conclude that the process leading to the refusal of Ms. Nguyen's application was fair. It was not unfair for the second officer to base their decision on matters that had not been identified as areas of concern by the first visa officer. Ms. Nguyen was given the opportunity to address these areas of concern after they were identified in the second procedural fairness letter before the decision was made.

B. *The Visa Officer's Decision was Reasonable*

[29] Ms. Nguyen argues it was unreasonable for the visa officer to rely on either the $300,000 payment to Empowered or the concern about a lack of progress as a basis to conclude that Ms. Nguyen entered into the agreement with Empowered for an improper purpose. For the following reasons, I conclude these were relevant factors that could be considered by the visa officer in their assessment, and the visa officer made reasonable findings and inferences with respect to each of them.

(1) Reliance on the $300,000 payment

[30] As noted above, Empowered issued a commitment certificate in the given IRCC form, which stated among other things that Empowered was investing $75,000 in the proposed business. Empowered and Ms. Nguyen also entered into a term sheet setting out certain aspects of the venture and the incubation program. Although not addressed in either of these documents, Ms. Nguyen and Empowered also entered a separate agreement under which Ms. Nguyen was to pay Empowered a fee of $300,000 for their services. That agreement was not part of the record, but the Commitment Certificate and term sheet note that Empowered would deliver customized

incubation programming for one year, would provide office space and administration infrastructure for one year if needed, and was responsible for paying legal fees and costs associated with incorporation once a work permit or permanent resident visa was issued.

[31] Ms. Nguyen argues that the $300,000 fee paid to Empowered is irrelevant to both the peer review process and to whether the requirements of the *Ministerial Instructions* are satisfied. She therefore argues that relying on this fact to conclude that Ms. Nguyen had an improper purpose was unreasonable.

[32] With respect to peer review, Ms. Nguyen points to section 11 of the *Ministerial Instructions*, which governs the peer review process:

Peer review	**Examen par les pairs**
11 (1) An officer may request that a commitment in respect of a qualifying business in an application referred to in subsection 9(1) <u>be independently assessed by a peer review panel</u> established under an agreement referred to in section 3 by an organization that has expertise with respect to the type of entity making the commitment.	**11 (1)** L'agent peut demander qu'un engagement relatif à une entreprise admissible dans une demande visée au paragraphe 9(1) <u>soit évalué de façon indépendante par un comité d'examen par les pairs</u> établi en vertu d'un accord visé à l'article 3 par une organisation qui a une expertise à l'égard du type d'entité qui prend l'engagement.
[…]	[…]

Independent assessment	**Évaluation indépendante**
(3) The peer review panel must provide the officer with its independent assessment of whether	**(3)** Le comité d'examen par les pairs remet à l'agent son évaluation indépendante de la conformité aux règles de l'industrie en ce qui concerne :
(a) the entity that made the commitment assessed the applicant and the applicant's business in a manner consistent with industry standards; and	**a)** l'évaluation du demandeur et de son entreprise faite par l'entité qui a pris l'engagement;
(b) the terms of the commitment are consistent with industry standards.	**b)** les modalités de l'engagement.
Assessment not binding	**Évaluation ne lie pas**
(4) An officer who requests an independent assessment is not bound by it.	**(4)** L'agent qui demande une évaluation indépendante n'est pas lié par cette évaluation.

[33] Ms. Nguyen argues based on these provisions that the peer review process is restricted to the issue of due diligence (paragraph 11(3)(*a*)) and the terms of the commitment (paragraph 11(3)(*b*)). She states that the form and contents of the commitment are described in section 6 of the *Ministerial Instructions*, which do not refer to the fees paid to the incubator. She therefore argues that the *Ministerial Instructions* do not allow the fees paid to the incubator to be considered.

[34] I am unable to accept this argument. In my view, the amount paid to an incubator as part of an agreement that involves the incubator's commitment falls within the scope of "the terms of the commitment," regardless of whether the fee is identified in the commitment document or the

term sheet. Among other things, paragraph 6(4)(*g*) of the *Ministerial Instructions* requires the commitment to describe the "legal and financial structure of the business", while paragraph 6(4)(*j*) requires the commitment to "specify any terms and conditions applicable to the business incubator program or to the commitment" [emphasis added]. The fact that the fee is provided for in a separate agreement, and was not referred to by Empowered on the commitment form does not in my view shield it from consideration as a term or condition applicable to the business incubator program or to the investment.

[35] On Ms. Nguyen's argument, stated expressly in oral submissions, a visa officer could not take into account the fact that a hypothetical applicant under the program paid $1,000,000 for nominal services plus the commitment required under the program, since the fee paid to an incubator is not expressly mentioned in section 6 of the *Ministerial Instructions*.

[36] This would not in my view accord with the language of the relevant sections of the *Ministerial Instructions* interpreted in light of their purpose and context. The relevant purpose includes the fact that, as the parties accept, the peer review process is intended in part to protect against fraud and ensure that the activities of the entrepreneur and the designated entity are consistent with industry standards: *Nguyen #1* at para 8. The legislative context includes the stated objectives of the *IRPA*, which includes maintaining "through the establishment of fair and efficient procedures, the integrity of the Canadian immigration system": *IRPA*, s 3(1)(*f.1*). While Ms. Nguyen relies on the "fair and efficient procedures" element of this objective, the "integrity" objective is equally important. It would not accord with this objective to interpret sections 6 and 11 of the *Ministerial Instructions* so narrowly that neither the peer review panel nor the visa

officer can consider whether a fee paid to an incubator in connection with an arrangement that includes the incubator providing an essential program commitment is inconsistent with industry standards.

[37] In any case, even if there were a limitation on the ability of the peer review panel to consider or identify an issue with respect to the fee, subsection 2(5) of the *Ministerial Instructions* in no way limits what factors the visa officer may consider in making an improper purpose assessment. To the contrary, that section is broadly worded, noting that it is the applicant's intention or participation "in an agreement or arrangement in respect of the commitment" that is the subject of the assessment.

[38] Ms. Nguyen makes reference to the relevant IRCC operating manual, "IP 13/OP 27 Start-Up Business Class." She points to sections in that manual dealing with the commitment certificate, the term sheet and agreement, and peer review, again arguing that they do not contain any discussion of the need to include or justify the fees paid to the incubator. I do not believe this operating manual assists Ms. Nguyen. The manual refers to the terms of the agreement between the entrepreneur and the designated entity, which again would include financial terms even if they are contained in a separate agreement and not in the term sheet or commitment document themselves. It also notes in connection with the "terms and conditions applicable to the investment or the commitment" that "[o]fficers should expect to see all conditions" [emphasis added] and that "[r]eviewing these conditions will be important to assess the genuineness of the venture": IP 13/OP 27 at p 14. While the examples given do not specifically identify fees, they

do deal with financial issues associated with the assessment of genuineness, and do not preclude consideration of the financial arrangements between an applicant and an incubator.

[39] Ms. Nguyen notes that the sections of the *IRPR* that now govern the start-up business class expressly prohibit charging a fee to review and assess a business proposal or business: *IRPR*, s 98.04(2). She argues this indicates that fees were not relevant under the *Ministerial Instructions*. I do not agree. The *Ministerial Instructions* can and should be interpreted on their own terms as being applicable to Ms. Nguyen. The fact that a specific provision regarding fees appears in the new regulations does not mean that they could not reasonably be considered as a relevant factor under the former *Ministerial Instructions*.

[40] Ms. Nguyen seeks to draw support from the decision of Justice Barnes in *Kwan v Canada (Citizenship and Immigration)*, 2019 FC 92. There, a concern was raised that the visa officer's file notes reflected a similar concern raised in a peer review report that a $300,000 fee payable to Empowered was "not normal for an incubator in Canada," and that this concern was not raised with Ms. Kwan to allow her to respond: *Kwan* at paras 3, 21. Justice Barnes rejected this argument on the basis that, although the visa officer had an initial concern about Empowered's business model, they did not base their decision on that concern: *Kwan* at paras 21–25. In doing so, Justice Barnes made the following observation at paragraph 25:

> In this case, the Visa Officer's tentative reservations about Empowered had no relevance to the assessment of Ms. Kwan's motives or her credibility. In fact, CABI's reference to Ms. Kwan's $300,000 commitment to Empowered was, not surprisingly, never taken up by the Visa Officer as a point of subsequent interest.
>
> [Emphasis added.]

[41] As I read Justice Barnes' comments, he is indicating in the first sentence above that the visa officer's reservations about the payment did not end up being a relevant issue for the visa officer in their assessment of Ms. Kwan's motives or credibility. I do not read him as stating that the issue is legally irrelevant such that it cannot be considered as a relevant factor. With respect to the second sentence above, there is little I can take from Justice Barnes' *obiter* comment that it was "not surprising" that the reference to the commitment was not taken up by the visa officer. I certainly cannot take it as a conclusion that the fees paid for an incubator to provide incubation services and a commitment under the start-up business class program can never be relevant to a determination of whether an applicant's primary purpose is to obtain a status or privilege under the *IRPA*.

[42] I reach the same conclusion with respect to Ms. Nguyen's reference to the decision of Justice Zinn in *Mourato Lopes v Canada (Citizenship and Immigration)*, 2019 FC 564. There, as in *Kwan*, there had been reference in the peer review report to the fee paid to Empowered, and again it was not a basis for the officer's decision, so could not be the basis for a fairness argument: *Mourato Lopes* at paras 4–8. At paragraph 4 of that decision, Justice Zinn stated:

> That review stated, in part, that the venture was not incorporated, and that Ms. Mourato Lopes had agreed to pay Empowered $500,000, which the review said was not normal. It appears that both statements are incorrect.
>
> [Emphasis added.]

[43] Again, Justice Zinn does not conclude that the fee paid to Empowered was necessarily irrelevant, or could not be considered by either the peer review panel or the visa officer. Rather, there is a conclusion that statements made in the review report in that case were incorrect. One of

those statements was clearly that the venture was not incorporated: *Mourato Lopes* at para 6. As for the fee, it is unclear whether it is the agreement to pay, the amount of the payment, or the fact that the payment was "not normal" that was found to be incorrect. In any event, such a finding would necessarily arise on the evidence before the visa officer and the Court in that case. As discussed below, there was no such evidence in this case.

[44] Ms. Nguyen makes an additional argument that the fees paid to an incubator cannot be relevant to the question of improper purpose, as this would be akin to assessing an immigration applicant or a criminal accused based on the amount of fees they paid to their lawyer or another professional advisor. I cannot accept this analogy. The role of an incubator in the development of a start-up business, or in an application for permanent residence under the start-up business class, is very different from that of counsel in providing legal advice in either the immigration or criminal context. Notably, the incubator provides more than professional advice or services: it provides an essential document, the commitment, needed for an applicant to qualify for the start-up business class program: *Ministerial Instructions*, ss 2(2)(*a*), 6(1). Regardless, to the extent that Ms. Nguyen sought to demonstrate that the fees paid to Empowered were in accordance with industry standard or justified on the basis of the services offered or received, she had the opportunity to do so in response to the fairness letter. She filed nothing to satisfy the visa officer's concerns in this regard.

[45] Nor can I conclude, as Ms. Nguyen suggests, that the fact that the first officer assessing her application did not state a concern about the incubator fee despite it being flagged by the review report shows that it is not reasonable to consider it. The fact that one decision maker does

not refer to a particular concern does not mean that it is inherently unreasonable for another decision maker to identify that concern.

[46] Unlike the situations in *Kwan* and *Mourato Lopes*, the visa officer in the present case did have concerns about the fee paid to the incubator, specifically that it was not in the normal course of business in Canada. They raised those concerns in the procedural fairness letter, giving Ms. Nguyen an opportunity to respond. Rather than provide information showing that the fee was consistent with industry standards, Ms. Nguyen's response to the procedural fairness letter on this issue consisted of distinguishing services provided by incubators from those provided by angel investors (who made up the peer review panel), and alleging conflict of interest and misunderstanding by the peer review panel. While this included a list of services stated to be offered by Empowered to Ms. Nguyen, it stated nothing about the normal course or industry standard fee for such services. In the absence of any responding information from Ms. Nguyen to show that the fee paid for the incubator services and commitment arrangement were consistent with industry standards, the visa officer concluded that the payment was not in the normal course of business, and this remained a concern in their improper purpose assessment.

[47] In my view, the visa officer's reasons on this issue show the justification, transparency, and intelligibility that are the hallmarks of a reasonable decision: *Vavilov* at para 99. Put another way, Ms. Nguyen has not met her burden to show that it was unreasonable for the visa officer to consider this issue in the manner that they did: *Vavilov* at para 100.

(2) Progress

[48] The procedural fairness letter sent to Ms. Nguyen identified two concerns on the part of the visa officer with respect to progress on the business: (i) that no progress had been made on the business since March 2018, despite the fact that the market for the business was outside Canada; and (ii) that there was little progress on the business in Canada during the period Ms. Nguyen held a work permit, between September 2017 and July 2018.

[49] Ms. Nguyen responded to the first of these concerns by noting that in March 2018, she received the first procedural fairness letter, which required her to focus on responding to the concerns, and that her application was then refused in July 2018, after which the status of her venture was at risk such that working to develop the business was unrealistic. She also argued that the fact that she went through the judicial review process to be able to keep pursuing her business and obtain permanent residence showed her motivation and dedication to the business venture. With respect to the latter concern, Ms. Nguyen argued that too much weight was being put on the existence of a work permit, given that work permits are not even necessary under the start-up business class program.

[50] In the GCMS notes, it is clear that the visa officer accepted as reasonable that no progress could be made in Canada in the period after the refusal, at which time Ms. Nguyen had no status in Canada and did not know if she would obtain permanent resident status. However, the officer noted that the business was incorporated in September 2017 and there had been no progress for over a year, which they concluded was not consistent with someone whose primary purpose was

to engage in business activities. They also considered that even without permanent resident status, Ms. Nguyen could establish her business in Canada if she wanted to with temporary permits, and that since her market was outside Canada, progress could have been made without her presence in Canada. The first issue therefore remained a concern for the visa officer.

[51] On the latter issue, the visa officer agreed with Ms. Nguyen's submission that a work permit was optional. However, they also noted that in Ms. Nguyen's particular case, Empowered had said that there were urgent business reasons for Ms. Nguyen to come to Canada before obtaining permanent residence, and that they needed to move quickly to prevent other entrepreneurs from delivering the solution. Nonetheless, despite this stated urgency and despite having a work permit, little progress was made in the business. This discrepancy between the stated intention for the work permit and Ms. Nguyen's actions once the permit was issued was again of concern to the visa officer as being inconsistent with the actions of someone whose primary intention was engaging in business activities.

[52] Ms. Nguyen argues that it was unreasonable for the visa officer to rely on the absence of progress in her business. She argues that the start-up business class program has no requirement to prove success or demonstrate a particular degree of progress. Rather, as set out in subsection 2(1) of the *Ministerial Instructions*, the class "consists of foreign nationals who have the <u>ability to become</u> economically established in Canada" [Ms. Nguyen's emphasis]. She also reiterates that an applicant does not even need to apply for a work permit, such that reliance on a lack of progress while Ms. Nguyen had a work permit is unreasonable.

[53] These arguments are not persuasive. The visa officer neither imposed a requirement to prove success or demonstrate a specific degree of progress. Rather, they compared Ms. Nguyen's own stated intentions as described in the commitment documents she filed to obtain a work permit and in support of her application for permanent residence with her actual conduct in moving the business forward. The evaluation that the visa officer had to conduct under subsection 2(5) of the *Ministerial Instructions* was whether Ms. Nguyen's participation in the agreement was "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." In the circumstances of Ms. Nguyen's application, considering the particular details of the commitment, and her actual business activities was reasonably relevant to that assessment.

[54] A similar argument was rejected by Justice Zinn in *Mourato Lopes*. The visa officer in that case similarly noted the lack of "significant progress" as a factor in the improper purpose assessment. Justice Zinn rejected the argument that this was unreasonable since there was no evidence that Empowered was concerned about her progress. He noted that in the circumstances of Ms. Mourato Lopes' application, "it was appropriate for the Officer to focus on her progress, or lack thereof, during the time period she was lawfully authorized to work": *Mourato Lopes* at para 13. I cannot agree with Ms. Nguyen's assertion that Justice Zinn did not correctly assess the point of the start-up business class program. The fact that there is no requirement to demonstrate a specific level of success or progress does not mean that the issue of progress cannot be a relevant factor in an improper purpose determination.

[55] Ms. Nguyen also argues that the visa officer unreasonably assumed that she could get a temporary work permit during a period after her application for permanent residence had expired. She says that such a work permit would not typically be granted by IRCC. In addition to there being no evidence to support this contention, I am unable to conclude that the visa officer unduly relied on the immediate availability of work permits. Rather, the visa officer considered the various obstacles that Ms. Nguyen had identified to her making progress, concluding that they were not satisfied that they would prevent her from growing her business during the period. In the circumstances, it was reasonable for the officer identifying Ms. Nguyen's "suspension of all progress" as a factor for consideration in assessing whether Ms. Nguyen's primary purpose of participating in the incubator agreement was to obtain a status under the *IRPA*.

[56] Finally, Ms. Nguyen argues that the visa officer's analysis of what could have been done during this period amounts to second-guessing her business. She argues that this was not the visa officer's role, which was limited to ensuring that she was not inadmissible and to be satisfied that Empowered conducted the necessary due diligence. I disagree. The visa officer was obliged by subsection 2(5) of the *Ministerial Instructions* to assess whether there was an improper purpose in Ms. Nguyen's involvement in the incubator agreement. This assessment is not outsourced to the incubator by limiting the visa officer's consideration to the issue of due diligence. As Justice Zinn put it, "the Minister is responsible for maintaining the integrity of the program, not Empowered": *Mourato Lopes* at para 11. In making this assessment, the visa officer will rely on their assessment of the applicant's particular situation, considering those factors that in their view speak to the applicant's primary purpose. Provided that assessment is reasonably based on pertinent facts and factors, this Court should not interfere: *Vavilov* at paras 83–85, 125–126.

[57] I therefore conclude that Ms. Nguyen has not satisfied her onus to demonstrate that the visa officer's reliance on the lack of progress made in her business was unreasonable.

[58] In light of the foregoing conclusions, I need not address Ms. Nguyen's claim for costs.

IV. Conclusion

[59] As I conclude that the visa officer's decision was fair and reasonable, the application for judicial review is dismissed.

[60] Neither party proposed a question for certification, and I agree that no certifiable question arises.

JUDGMENT IN IMM-4836-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

"Nicholas McHaffie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4836-19
STYLE OF CAUSE:	HOANG BAO TRAN NGUYEN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

HEARING HELD BY VIDEOCONFERENCE ON JUNE 2, 2020 FROM OTTAWA, ONTARIO (COURT) AND MONTREAL, QUEBEC (PARTIES)

JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	DECEMBER 7, 2020

APPEARANCES:

Stephen J. Fogarty	FOR THE APPLICANT
Michel Pépin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Fogarty Law Firm Dorval, Quebec	FOR THE APPLICANT
Attorney General of Canada Montreal, Quebec	FOR THE RESPONDENT