

Federal Court



Cour fédérale

Date: 20221118

Docket: IMM-3380-22

Citation: 2022 FC 1586

Vancouver, British Columbia, November 18, 2022

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

**HOSSEIN MAHKAM AND
MANSOUREH SEZAVARMANESH AND
MICHAEL MAHKAM**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Applicants seek judicial review, pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a February 24, 2022 decision (the “decision”) of a visa officer (the “Officer”), wherein the Officer refused an application for permanent residency made by Hossein Mahkam (“Mr. Mahkam”). Mr. Mahkam had sought permanent residency in the self-

employed person class, pursuant to section 12(2) of the *IRPA* and section 100(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*]. The Officer found that Mr. Mahkam did not meet the definition of a “self-employed person” as set out in s. 88(1) of the *IRPR*.

[2] The Applicants contend, among others, that the Officer’s decision is unjustified and that the reasons are incomprehensible and arbitrary. For the reasons set out below, I dismiss the application for judicial review.

II. Facts

[3] The principal Applicant, Hossein Mahkam (42 years old); his spouse, Mansoureh Sezavarmanesh (40 years old); and, their son, Michael Mahkam (9 years old), are citizens of Iran.

[4] Mr. Mahkam is a self-employed cinema scriptwriter and director in Iran, who intends to establish Mahkam Film Studio (the “studio” or “business”) in Vancouver, BC. Mr. Mahkam intends that the studio will be “active in theatre, film, and video content production as well as screenwriting and playwriting for movies and theatre plays, with a focus on the promotion of Canadian and immigrant art and culture”. Mr. Mahkam also intends to “be engaged in experimental coaching and mentoring of students interested in learning experimental and practicum role-play in theatre as well as directing, screenwriting, and playwriting”.

[5] Mr. Mahkam's only connection to the Canadian film industry is a 5-year distribution agreement, entered into in 2017 with a Toronto based company for the distribution of one of his films. In addition to his past work experience and training, Mr. Mahkam provided the visa Officer with a business plan that detailed his objectives for his studio and his strategy to achieve those objectives.

III. Decision under Review

[6] In his reasons for refusing the application, the Officer stated: "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 you have the ability and intent [emphasis added] to become self-employed in Canada".

[7] The refusal letter did not further elaborate on the reasoning behind the Officer's assessment; however, the Officer's Global Case Management System notes (the "notes") provide a detailed account of that reasoning process. The Officer took note of the following:

- the principal Applicant's work experience in Iran;
- the principal Applicant's objectives regarding his future self-employment in Canada;
- the principal Applicant's Business Plan and, more importantly, its shortcomings:
 - Insufficient proof of communications, plans, contracts or agreements with potential Canadian collaborators in support of his self-employment objectives;
 - Whether there is a demand for such a business in Canada and Vancouver;
 - Insufficient and unclear information about financial details surrounding the proposed business in Canada and the source of income projections;
 - Insufficient evidence about how the principal Applicant intends to obtain business and contracts in Canada (lack of the following: business and industry contacts,

future contracts, evidence of correspondence, collaboration or communication with potential clients, detailed analysis of the existing market environment or how the applicant intends to reasonably secure a share of the available market);

- Assessment of business competitors in Vancouver;

[8] The notes conclude by stating that the principal Applicant “provided insufficient evidence to show that [he] has adopted a plan that would reasonably be expected to lead to future self-employment. Consequently, [he] does not meet [the] definition of self-employed”.

IV. Relevant Provisions

[9] The relevant provisions are sections 12(2) of the *IRPA* (Economic immigration) as well as sections 100(1)–(2) of the *IRPR* (Self-employed Persons Class) and subsection 88(1)(a)(i) of the *IRPR*, which addresses a self-employed Applicant’s relevant experience in cultural activities and defines a self-employed person. These provisions are reproduced in the Appendix.

V. Issues and Standard of Review

[10] The Applicants frame the issues as follows:

A. Was the Officer’s decision reasonable in light of the evidence before them [sic]?

B. Was there a breach of procedural fairness?

[11] The presumptive standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at para 23 [*Vavilov*]). None of the exceptions to the

presumption of the reasonableness standard apply in the circumstances (*Vavilov*, at paras 17 and 25). Therefore the question is whether the Officer's reasoning and the outcome of the decision, were based on an inherently coherent and rational analysis that is justified in light of legal and factual constraints (*Vavilov* at para 85). Reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it (*Vavilov* at para 95). To set aside a decision, a reviewing court must be convinced that there are sufficiently serious shortcomings in the decision, such that any superficial or peripheral flaw will not suffice to overturn the decision (*Vavilov* at para 100). Importantly, a reviewing court must consider the decision as a whole, and must refrain from conducting a line-by-line search for error (*Vavilov* at paras 85 and 102).

[12] On the issue of procedural fairness, the Supreme Court in *Canada (Citizenship and Immigration) v Khosa*, 2009 1 SCR 339 [*Khosa*] at para 43, opined that correctness is the appropriate standard of review.

VI. Analysis

Was the Officer's decision reasonable in light of the evidence?

[13] The Applicants contend that the Officer's decision is a "reviewable error" and that it does not meet the hallmarks of reasonableness: justification, transparency and intelligibility. They say, among others, that the Officer misunderstood the legislative intent with regard to the self-employed person class and that the Officer's interpretation of the facts and the weight given to the evidence demonstrate no rational or intelligible chain of analysis.

[14] The Respondent contends that visa officers enjoy a high degree of discretion in their decision-making and are entitled to a considerable degree of deference: see, *Azimlou v Canada (MCI)*, 2022 FC 259 at para 11 [*Azimlou*]. A visa officer is not required to give extensive reasons; however, the reasons must explain the result (*Azimlou, supra*, at para 12 citing *Pacheco v Canada (Citizenship and Immigration)*, 2010 FC 347 at para 36; *Ogbuchi v Canada (Citizenship and Immigration)*, 2016 FC 764 at paras 10–13; *Omijie v Canada (Citizenship and Immigration)*, 2018 FC 878 at paras 22–28. The reviewing court should intervene only if the reasons given, viewed in the context of the record, fail this test (*Azimlou, supra*, at para 12). As Binnie J. stated in *Khosa*, at paras 59 and 61, it is not the role of the reviewing court to reweigh the evidence or to substitute its own view of a preferable outcome.

[15] The Applicants say that the Officer fettered his discretion in that he failed to consider the “significant contributions” the principal Applicant’s business would provide to cultural activities in Canada. The Applicants fault the Officer for focusing “solely” on the financial aspects of the business plan. In my view, the Applicants fail to appreciate that section 88(1) of the *IRPR* sets out a conjunctive test. For ease of reference, I set out the relevant section:

self-employed person means a foreign national who has relevant experience **and** has the intention **and** ability to be self-employed in Canada **and** to make a significant contribution to specified economic activities in Canada. (travailleur autonome)

[emphasis added]

travailleur autonome
Étranger qui a l’expérience utile **et** qui a l’intention **et** est en mesure de créer son propre emploi au Canada **et** de contribuer de manière importante à des activités économiques déterminées au Canada. (self-employed person)

[je souligne]

[16] All elements of that test must be met. It was incumbent upon Mr. Mahkam to establish that he had a) *relevant experience*, b) the *intention* **and** the *ability* to be self-employed in Canada, **and**, c) the *ability* to make a significant contribution to specified economic activities in Canada [emphasis added].

[17] The Officer's reasons for rejecting the principal Applicant's permanent residence request were not based on any perception that Mr. Mahkam lacks experience as a filmmaker, director and producer. The "relevant experience" component of the conjunctive test was not an issue. The Officer acknowledged in his notes that Mr. Mahkam had extensive past experience in the film industry in Iran, including in productions, screenplays and contract negotiation. The Officer did not overlook the "relevant experience" component of the test, as contended by the Applicants.

[18] Rather, the rejection flowed largely from the deficiencies of the proposed business plan for self-employment in Canada. The Officer was concerned about the principal Applicant's ability to transfer his cinematographic experience in Iran into an "...intent and ability to be self-employed in Canada and to make a significant contribution to specified economic activities in Canada", as required by s. 88(1) of the *IRPR*. The supporting evidence before the Officer of the principal Applicant's intent and ability in this regard was his business plan. The Officer reasonably found that that business plan had significant shortcomings.

[19] The Officer found that the principal Applicant did not adequately detail the means by which he would achieve his objectives to become profitably self-employed. The Officer concluded there was nothing in the application to prove that financial arrangements or contracts

were in place. The principal Applicant contends that he will contribute close to \$100,000 of his own money to start up the business. However, there was no evidence to establish that Mr. Mahkam has those funds set aside. The financial projections regarding revenues, sales forecasts, profits, and losses were questionable and not otherwise substantiated. The Officer's assessment acknowledged this reality. Mr. Mahkam bears the onus to advance "[...] a well-conceived, researched and executed project that indicates a serious possibility of economic success [...]": *Wei v Canada (Citizenship and Immigration)*, 2019 FC 982 at para 43. This he failed to do.

[20] In considering the Applicant's contribution to the cultural and artistic life of Canada, the Officer noted that the Applicant intended to market to the Persian/Iranian community in the Vancouver area. The Applicant used the 2016 census data to show a population base of approximately 45,000 Persians in the greater Vancouver area. Using that data, the Officer concluded that the target market share was insufficient to qualify as a "significant contribution" to "specified economic activities in Canada". Given that s. 88(1) of the *IRPR* offers no definition of "significant contribution" the Officer used his judgment to determine this threshold. I cannot conclude that approach was unreasonable.

Procedural fairness

[21] The Applicants contend that the Officer's refusal constitutes a veiled credibility finding and that the Officer "[...] had a duty to abide by procedural fairness and allow the Applicant an opportunity to disabuse the Officer of their concern".

[22] Procedural fairness lies at the heart of a culture of justification. In *Baker*, Justice L’Heureux-Dubé held that an administrative decision-maker is under a duty to provide “some form of reasons” when “the decision has important significance for an affected party” (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 [*Baker*] at para 43). On this standard of “some form of reasons”, the informal notes of a junior immigration officer have been held to constitute reasons (*Baker* at para 44).

[23] In my view, the Officer’s notes constitute adequate reasons. They justify the decision and are intelligible and transparent. The fact the Applicants do not agree with the Officer’s assessment, does not amount to a lack of procedural fairness. As previously mentioned, visa officers enjoy a high degree of discretion and are entitled to a considerable degree of deference (*Azimlou, supra* at para 11). Furthermore, the “operational realities of their work”, which involves the need to process a high volume of applications, militates against the need to give extensive reasons: see, *Kucukerman v Canada (MCI)*, 2022 FC 50 at para. 27 and *Azimlou, supra*).

VII. Conclusion

[24] The Applicants essentially re-argue their case and seek to have this Court reweigh the evidence *de novo*. This is not the Court’s role.

[25] The Officer concluded that the Applicant failed to establish two parts of the three-part test, (i) the intention and the ability to be self-employed in Canada, and, (ii) the ability to make a

significant contribution to specified economic activities in Canada. Those conclusions are not unreasonable. The Officer's notes are justified, transparent and intelligible.

[26] The application for judicial review is dismissed.

JUDGMENT in IMM-3380-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. No question is certified for consideration by the Federal Court of Appeal.
3. All without costs.

"B. Richard Bell"

Judge

APPENDIX

Immigration and Refugee Protection Act, SC 2001, c 27

Economic immigration

12 (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.

Immigration and Refugee Protection Regulations, SOR/2002-227

Definitions

88 (1) The definitions in this subsection apply in this Division.

[...]

relevant experience, in respect of

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, consisting of

(i) in respect of cultural activities,

(A) two one-year periods of experience in self-employment in cultural activities,

(B) two one-year periods of experience in participation at a world class level in cultural activities, or

(C) a combination of a one-year period of experience described in clause (A) and a one-year period of experience described in clause (B),

[...]

Loi sur l'immigration et la protection des réfugiés, LC 2001, c 27

Immigration économique

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

Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227

Définitions

88 (1) Les définitions qui suivent s'appliquent à la présente section.

[...]

expérience utile

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 où il est statué sur celle-ci, composée :

(i) relativement à des activités culturelles :

A) soit de deux périodes d'un an d'expérience dans un travail autonome relatif à des activités culturelles,

B) soit de deux périodes d'un an d'expérience dans la participation à des activités culturelles à l'échelle internationale,

C) soit d'un an d'expérience au titre de la division (A) et d'un an d'expérience au titre de la division (B),

[...]

self-employed person means a foreign national who has relevant experience and has the intention and ability to be self-employed in Canada and to make a significant contribution to specified economic activities in Canada. (*travailleur autonome*)

[...]

Self-employed Persons

Self-employed Persons Class

Members of the class

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).

Minimal requirements

(2) If a foreign national who applies as a member of the self-employed persons class is not a self-employed person within the meaning of subsection 88(1), the application shall be refused and no further assessment is required.

travailleur autonome Étranger qui a l'expérience utile et qui a l'intention et est en mesure de créer son propre emploi au Canada et de contribuer de manière importante à des activités économiques déterminées au Canada. (*self-employed person*)

[...]

Travailleurs autonomes

Catégorie

Qualité

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)

Exigences minimales

(2) Si le demandeur au titre de la catégorie des travailleurs autonomes n'est pas un travailleur autonome au sens du paragraphe 88(1), l'agent met fin à l'examen de la demande et la rejette.

FEDERAL COURT
SOLICITORS OF RECORD

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