Federal Court  Cour fédérale

Date: 20110531

Docket: IMM-4562-10

Citation: 2011 FC 631

Ottawa, Ontario, May 31, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ANATOLIY KABANETS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 (the Act) for judicial review of a decision of a First Secretary of the Immigration Section at the Canadian Embassy in Kyiv, Ukraine (the Secretary), dated July 23, 2010, wherein the Secretary refused the applicant permanent residence as a member of the

entrepreneur class as defined in subsection 88(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

[2] The applicant requests an order quashing the decision of the First Secretary and directing the respondent to process his application according to the law and within 60 days of the date of the order.

Background

[3] Anatoliy Kabanets (the applicant) is a Ukrainian citizen. He has lived and worked in Kyiv since 1990. On his release from the military in October 1999, he began working for a company called Petrus as a mechanical engineer. He worked for Petrus until July 2007 and has worked for several other companies since that time in engineering positions.

[4] In July 1999, the applicant and his brother registered the company, Viol (Viol or the business). The applicant is a founder and owner of the business, which is located several hours away from Kyiv in Kamyanets-Podilskyy. The applicant holds a 40 percent share of the business and his brother holds the remaining 60 percent. It is not disputed that Viol meets the definition of a "qualifying business" in the Regulations.

[5] In August 2001, the applicant's wife applied for a permanent resident visa. She was interviewed in January 2002 and was questioned about the applicant's employment, along with other details related to her application. The only employment of his that she described on her application and in her interview was his position with Petrus.

[6] On August 16, 2005, the applicant applied for a permanent resident visa as a member of the entrepreneur class.

[7] The Secretary interviewed the applicant on July 19, 2010 regarding his application. The applicant was asked questions about the financial and day-to-day management of Viol. He claimed that, since January 2000, he has handled the day-to-day management of Viol, including negotiating with suppliers and preparing a list of the orders, as well as overseeing production and equipment maintenance. The applicant claimed to have spent a great deal of time on-site until 2007 and since then, has visited approximately once a week. The applicant has signing authority on the business's bank account but has never received more than a nominal salary and in fact, only received any salary in 2004 and 2005.

The Secretary's Decision

[8] The Secretary determined that the applicant had failed to demonstrate the management experience required by the Regulations. The Secretary was concerned that virtually all of the business's documents that were submitted were signed by his brother (or in a few instances by Viol's accountant) rather than by the applicant.

[9] Further, the applicant was unable to answer questions about Viol's profits, turnover, payroll information, suppliers or to identify the company's most profitable year.

[10] The Secretary noted that the applicant provided conflicting information in his interview which was not supported by the documents submitted. The Secretary acknowledged that one partner of a business may not always be very familiar with the finances, but found that it was reasonable to expect that someone involved in managing a company would have at least a general idea of its profits and losses.

[11] The Secretary further noted that throughout the relevant period, the applicant had lived in Kyiv, which he acknowledged was several hours away from Viol's office in Kamyanets-Podilskyy. The Secretary was also concerned that the applicant has generally not received a salary from Viol and that, when he did receive a salary in 2004 and 2005, it was a nominal one, and with his failure to explain why his wife's application for permanent residence did not mention Viol.

Issues

[12] The applicant characterizes the issues as:

1. Did the Secretary misapply the definition of an entrepreneur:
    a. By equating financial management with financial control and with business management; and
    b. By failing to consider the five years preceding the date of the application?
2. Do the deficiencies in the CAIPS notes amount to a breach of procedural fairness?

[13] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Are the CAIPS notes deficient?

3. Is the decision reasonable?

Applicant's Written Submissions

[14] The applicant submits that the Secretary erred by misapplying the definition of an entrepreneur in considering his application. The applicant argues that the Secretary erred by interpreting the definition as requiring an applicant to demonstrate financial management of the business. The applicant claims that he handles the everyday management of the business even though his brother handles the financial management. The applicant further argues that he was aware of some of the financial details of the business, including how employees' salaries are calculated and its most profitable years.

[15] The applicant claims that he handles negotiations with suppliers, oversees the production process, hiring staff, purchasing and maintaining machinery and overseeing deliveries. The applicant argues that this evidence demonstrates his experience managing the business.

[16] The applicant submits that the Secretary erred by only considering the recent evidence and not considering the evidence from earlier in the relevant period. The relevant period for assessment spanned almost 10 years and the applicant argues that the Secretary's focus on the management of the business in recent years is unreasonable. The applicant relies on *Hajariwala v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 79, in which this Court held that the purpose of the

Act is to permit immigration and that officers are therefore obliged to provide a thorough and fair assessment of applications.

[17] The applicant submits that the CAIPS notes are deficient and that this deficiency amounts to a breach of procedural fairness. The applicant argues that a corrupted or incomplete file can amount to a breach of procedural fairness, citing *Velazquez Ortega v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1407. The applicant argues that the deficiencies in the CAIPS notes, which are listed in his affidavit, would all have been in his favour had they been corrected. The applicant therefore argues that the deficiencies are material and warrant this Court's intervention.

Respondent's Written Submissions

[18] The respondent submits that the Secretary asked the applicant questions about the day-to-day management of the business as well as about its finances. The respondent argues that the Secretary considered all of the evidence and that it was open to her to conclude that the applicant did not have the required management experience. The respondent notes that, contrary to the arguments in his memorandum, the applicant was not able to identify the business's most profitable year.

[19] The respondent submits that the Secretary considered the proper relevant period and identified it in the decision as the period from August 16, 2000 to the date of the decision.

[20] The respondent submits that the deficiencies in the CAIPS notes are explained in the Secretary's affidavit and that they resulted from the reproduction and transmission of the notes rather than from the notes themselves. A complete copy of the CAIPS notes is included in the Secretary's affidavit.

Analysis and Decision

[21] **Issue 1**

What is the appropriate standard of review?

The applicant submits that breaches of procedural fairness are reviewable on the correctness standard, citing *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 and *Velazquez Ortega* above. The respondent submits that the standard of review applicable to findings of fact and to questions of mixed fact and law is reasonableness, citing *Dunsmuir* above.

[22] The issue of whether the CAIPS notes are deficient is a question of procedural fairness and therefore attracts the correctness standard, as the applicant has argued.

[23] Although not specifically argued by either party, this Court has held that decisions of a visa officer reviewing an application from a member of the entrepreneur class attract deference and are therefore reviewable on the reasonableness standard (see *Nasseri v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1330 at paragraph 14).

[24] **Issue 2**

Are the CAIPS notes deficient?

The CAIPS notes appear to have been corrupted when they were printed off and transmitted rather than being deficient in and of themselves. As such, these deficiencies do not breach procedural fairness. The full notes, which are reproduced in the Secretary's affidavit, include evidence in support of the application, the omission of which the applicant claims breached procedural fairness. The Secretary's evidence demonstrates that all of the evidence was before her when she decided the application and that procedural fairness was therefore not breached.

[25] *Velazquez Ortega* above, is not relevant to this application. That decision involved a pre-removal risk assessment (PRRA) in which an applicant made it clear that he intended to rely on new evidence which he sent to the officer via courier. The evidence was lost through no fault of the applicant's and was not considered by the officer and so his PRRA was rejected. The Court held that the loss of this evidence breached procedural fairness because it was relevant and was lost through no fault of the applicant.

[26] The applicant claims that the Secretary failed to address the earlier time period prior to 2007. However, a review of the CAIPS notes shows that the Secretary did look at this period. By way of example, the CAIPS notes at page 22 of the applicant's record, read as follows:

> Furthermore, the documentation on file and that presented at interview does not support that the applicant was on site managing the day to day activities and operation of the business. The fact remains that the applicant has lived in and worked in Kyiv during the period where he states he was also managing the business Agenstvo Viol in Kamyanets-Podilskyy a significant distance (more than 5 hours) away. The applicant's current and previous employer had no knowledge of the applicant's business Viol, therefore it is reasonable

> to conclude that he was not conducting his private business activities while at work to an extent that they required explanation.
>
> I also balance the fact that the applicant states that until 2007 he had a flexible work schedule with Petrus company and so could be more often on site at Agenstvo Viol company, to the fact that Agenstvo Viol is located more than 7 hours by train or 5 hours by car from where the applicant lives and works. I do not find it credible that the applicant would be able to be significantly present at Agenstvo Viol while living and working elsewhere, even with a flexible work schedule.
>
> The applicant states that he has not paid tax on any income from the company because he has not received any dividends from the company. As per pay roll records he is only listed in the year 2004-2005 and for a nominal salary. Applicant's brother however receives a monthly salary. . . .

[27] **Issue 3**

Is the decision reasonable?

The applicant has failed to demonstrate that the decision is unreasonable. Although the applicant has highlighted certain evidence which favours his application, that evidence was before the Secretary when she rejected his application and it appears that the applicant is merely disputing the weight assigned to this evidence. The applicant has failed to establish that the decision does not fall within the range of reasonable outcomes defensible in fact and in law and has therefore failed to establish a basis for this Court's intervention.

[28] As a result, the application for judicial review should be dismissed.

[29] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[30] **IT IS ORDERED that** the application for judicial review is dismissed.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, SC 2001 c 27

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.	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.

Immigration and Refugee Protection Regulations, SOR/2002-227

88. (1) The definitions in this subsection apply in this Division.	88. (1) Les définitions qui suivent s'appliquent à la présente section.
"business experience", in respect of	« expérience dans l'exploitation d'une entreprise » :
. . .	. . .
(b) an entrepreneur, other than an entrepreneur selected by a province, means a minimum of two years of experience consisting of two one-year periods of experience in the management of a qualifying business and the control of a percentage of equity of the qualifying business 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; and	b) s'agissant d'un entrepreneur, autre qu'un entrepreneur sélectionné par une province, s'entend de l'expérience d'une durée d'au moins deux ans composée de deux périodes d'un an d'expérience dans la gestion d'une entreprise admissible et le contrôle d'un pourcentage des capitaux propres de celle-ci 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;
"entrepreneur" means a foreign national who	« entrepreneur » Étranger qui, à la fois :
(a) has business experience;	a) a de l'expérience dans l'exploitation d'une entreprise;
(b) has a legally obtained minimum net worth; and	b) a l'avoir net minimal et l'a obtenu licitement;
(c) provides a written statement to an officer	c) fournit à un agent une déclaration écrite

that they intend and will be able to meet the conditions referred to in subsections 98(1) to (5).

portant qu'il a l'intention et est en mesure de remplir les conditions visées aux paragraphes 98(1) à (5).

"percentage of equity" means

« pourcentage des capitaux propres »

. . .

. . .

(b) in respect of a corporation, the percentage of the issued and outstanding voting shares of the capital stock of the corporation controlled by a foreign national or their spouse or common-law partner; and

b) dans le cas d'une société par actions, la part des actions du capital social avec droit de vote émises et en circulation que contrôle l'étranger ou son époux ou conjoint de fait;

"qualifying business" means a business — other than a business operated primarily for the purpose of deriving investment income such as interest, dividends or capital gains — for which, during the year under consideration, there is documentary evidence of any two of the following:

« entreprise admissible » Toute entreprise — autre qu'une entreprise exploitée principalement dans le but de retirer un revenu de placement, tels des intérêts, des dividendes ou des gains en capitaux — à l'égard de laquelle il existe une preuve documentaire établissant que, au cours de l'année en cause, elle satisfaisait à deux des critères suivants :

(a) the percentage of equity multiplied by the number of full time job equivalents is equal to or greater than two full-time job equivalents per year;

a) le pourcentage des capitaux propres, multiplié par le nombre d'équivalents d'emploi à temps plein, est égal ou supérieur à deux équivalents d'emploi à temps plein par an;

(b) the percentage of equity multiplied by the total annual sales is equal to or greater than $500,000;

b) le pourcentage des capitaux propres, multiplié par le chiffre d'affaires annuel, est égal ou supérieur à 500 000 $;

(c) the percentage of equity multiplied by the net income in the year is equal to or greater than $50,000; and

c) le pourcentage des capitaux propres, multiplié par le revenu net annuel, est égal ou supérieur à 50 000 $;

(d) the percentage of equity multiplied by the net assets at the end of the year is equal to or greater than $125,000.

d) le pourcentage des capitaux propres, multiplié par l'actif net à la fin de l'année, est égal ou supérieur à 125 000 $.

97. (1) For the purposes of subsection 12(2) of the Act, the entrepreneur class is hereby prescribed as a class of persons who may become permanent residents on the basis of

97. (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des entrepreneurs est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait

their ability to become economically established in Canada and who are entrepreneurs within the meaning of subsection 88(1).

(2) If a foreign national who makes an application as a member of the entrepreneur class is not an entrepreneur within the meaning of subsection 88(1), the application shall be refused and no further assessment is required.

de leur capacité à réussir leur établissement économique au Canada et qui sont des entrepreneurs au sens du paragraphe 88(1).

(2) Si le demandeur au titre de la catégorie des entrepreneurs n’est pas un entrepreneur 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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