Federal Court

Cour fédérale

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SUBJECT / OBJET :

Court File No. : /N° du dossier de la Cour: **Imm-5376-18**

Between/Entre: **Zhang v MCI**

Enclosed is a true copy of the Judgment and Reasons of Madam Justice Walker dated 3 june, 2019.

COMMENTS / REMARQUES :

Please acknowledge receipt of this fax. Thank you!

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Federal Court  Cour fédérale

Date: 20190603

Docket: IMM-5376-18

Citation: 2019 FC 764

Ottawa, Ontario, June 3, 2019

PRESENT: Madam Justice Walker

BETWEEN:

ZHANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Lizi Zhang, seeks judicial review of a decision (Decision) of a visa officer refusing his application for permanent residence under the self-employed persons class prescribed in subsection 100(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations). The application for judicial review is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] For the reasons that follow, the application is allowed.

I. Background

[3] The Applicant is a citizen of China. In August 2017, he applied for permanent residence in Canada as a member of the self-employed persons class (athletics).

[4] The Applicant is a table tennis coach. He has worked at the in China for 14 years. A number of the Applicant's students have competed at national and international competitions. Prior to coaching, the Applicant played for both Guangdon's provincial table tennis team and China's national team.

[5] The Applicant furnished a letter of reference from the Sports School in support of his application. He stated that he had no official contract with the school but worked pursuant to a verbal agreement. The Applicant is paid an annual fixed salary of RMB 180, 000 and receives bonuses when his students win competitions. The Applicant also receives social insurance benefits from the school.

II. Decision under review

[6] The Decision of the visa officer (Officer) is dated September 5, 2018 and consists of: (1) a letter setting out the Officer's refusal of the Applicant's application for permanent because he failed to demonstrate that he had the self-employment experience in athletics required pursuant

to subsection 88(1) of the Regulations; and (2) the Officer's Global Case Management System (GCMS) notes, which form part of the Decision (Pushparasa v Canada (Citizenship and Immigration), 2015 FC 828 at para 15). In the letter, the Officer stated:

> You failed to demonstrate to my satisfaction, in respect of athletic activities, that you have "relevant experience" as required under subsection 88(1) of the Regulations. You have been a salaried employee as a table tennis coach at The Youth Amateur Sports School of Nanshan District since June 2004, and this employment does not meet the requirements of "relevant experience" as required under definition of a "self-employed person" per R88(1).

[7] The GCMS notes provide further detail regarding the Officer's conclusions and an overview of the interview held with the Applicant in Hong Kong. The Officer noted that, pursuant to subsection 88(1) of the Regulations, the Applicant was required to demonstrate that he had engaged in two one-year periods of self-employment in athletic endeavours since August 11, 2012 (being the date five years before the date of his application for a permanent resident visa). The Officer concluded that the Applicant had not satisfied this requirement. As a result, the Officer refused his application in reliance on subsection 100(2) of the Regulations.

[8] With respect to the interview, the Officer first indicated that the interview was conducted through an interpreter. The Applicant was advised that the role of the interpreter was to help him answer questions and that, if he did not understand something, he was to ask the Officer.

[9] The Officer questioned the Applicant regarding his time as a professional athlete in China, which ended in June 2004, and his experience working as a table tennis coach. The Officer asked the Applicant to describe his work at the Sports School. The Applicant stated that

he trains students at the school from 4:30 to 7:30 each day, attends competitions and provides weekend training.

[10] The Officer noted that the Applicant has no official contract with the Sports School. He works at the school pursuant to a verbal agreement, receiving an annual income, bonuses and social insurance benefits, including medical insurance. When advised of the Officer's concerns that he was a salaried employee at the Sports School and that there was insufficient evidence that he was self-employed, the Applicant stated that he recruited students and undertook marketing on behalf of the school in addition to his work as a table tennis coach.

III. Issues and standard of review

[11] The Applicant submits that the Decision was unreasonable for two reasons. The Applicant first argues that the Officer made erroneous findings of fact in concluding that he is not a self-employed person for purposes of the Regulations. Second, he argues that the Officer failed to consider subparagraph (B) of the definition of "relevant experience" (athletics) in subsection 88(1) of the Regulations, and its requirement of participation in athletics at a world class level, in light of the Applicant's coaching experience.

[12] The standard of review for a visa officer's decision on the admission of a foreign national under the self-employed sub-class of the economic class is reasonableness as the officer's assessment involves questions of mixed facts and law (*Al-Katanani v Canada (Citizenship and Immigration)*, 2016 FC 1053 at para 11; *Singh v Canada (Citizenship and Immigration)*, 2016 FC 904 at para 10). This Court will only interfere if the Officer's Decision lacks justification,

transparency, or intelligibility, and falls outside the range of possible, acceptable outcomes which are defensible on the particular facts of the case and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[13] The Applicant also submits that the Officer breached his right to procedural fairness by failing to ensure that the Applicant understood and responded to the concern that he was not self-employed. I will review this issue for correctness (Mission Institution v Khela, 2014 SCC 24 at para 79; Canadian Pacific Railway Company v Canada (Attorney General), 2018 FCA 69 at paras 34-56 (Canadian Pacific)).

IV. Preliminary Issue – Admissibility of Affidavit

[14] The Applicant filed an affidavit in support of this application from a lawyer in China, Mr. Wang Cheng. The Respondent objected to the admission of the affidavit as it contains information that was not before the Officer when making the Decision (*Samsonov v Canada (Citizenship and Immigration)*, 2006 FC 1158 at para 7; *Farid v Canada (Citizenship and Immigration)*, 2015 FC 579 at para 22).

[15] The Applicant conceded at the hearing that the affidavit is not admissible in this application and I have not considered the affiant's statements in arriving at my decision.

V. Legislative Provisions

[16] The full text of the relevant provisions of the IRPA and the Regulations is set out in Annex A to this judgment.

VI. Analysis

1. Was the Decision reasonable?

Legislative Framework

[17] In order to properly frame my analysis of the Decision, I will first set out a summary of the applicable legislative provisions.

[18] Subsection 11(1) of the IRPA requires a foreign national to apply for a visa prior to entering Canada. Pursuant to subsection 12(2) of the IRPA, a foreign national may be selected for permanent residence as a member of the economic class based on their ability to become economically established in Canada.

[19] Subsection 100(1) of the Regulations prescribes the self-employed persons class as a class of persons (1) who may become permanent residents on the basis of their ability to become economically established in Canada and (2) who are "self-employed persons" within the meaning of subsection 88(1) of the Regulations. If a foreign national who applies as a member of the self-employed persons class does not qualify as a self-employed person, their application

must be refused (subs. 100(2) of the Regulations). The Applicant applied for a permanent resident visa as a self-employed person in August 2017.

[20] The definition of a self-employed person in subsection 88(1) of the Regulations contains three requirements. The requirements are cumulative and the foreign national must satisfy each requirement. The foreign national must establish that they have:

1. the relevant experience as defined in subsection 88(1);
2. the intention and ability to be self-employed in Canada; and
3. the intention and ability to make a significant contribution to specified economic activities in Canada.

[21] The term "specified economic activities" in respect of a self-employed person is defined as cultural activities, athletics or the purchase and management of a farm.

[22] In this case, the determinative issue before the Officer was whether the Applicant had the required relevant experience to qualify as a self-employed person for purposes of the Regulations. The definition of "relevant experience" in athletics in subsection 88(1) is as follows:

relevant experience, in respect of	***expérience utile***
(a) a self-employed person ... 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	(a) S'agissant d'un travailleur autonome ... 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

determination is made in respect of the application, consisting of …	de résident permanent est faite et prenant fin à la date où il est statué sur celle-ci, composée : …
(ii) in respect of athletics activities,	(ii) relativement à des activités sportives :
(A) two one-year periods of experience in self-employment in athletics,	(A) soit de deux périodes d'un an d'expérience dans un travail autonome relatif à des activités sportives,
(B) two one-year periods of experience in participation at a world class level in athletics, or	(B) soit de deux périodes d'un an d'expérience dans la participation à des activités sportives à l'échelle internationale,
(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), and	(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),
[...]	[...]

Analysis of the Decision

[23] The Applicant makes two distinct arguments in support of his contention that the Decision was not reasonable. In his written submissions, the Applicant argues that the Officer erred in concluding that he is not self-employed as a table tennis coach in China. This argument centres of subparagraph (A) of the definition of relevant experience (athletics). At the hearing before me, the Applicant argued that the Officer unreasonably ignored subparagraph (B) of the definition and failed to consider whether his work as a high level coach satisfied the requirement

of participation in world class athletics during the relevant period (five years prior to the date of his application). In this latter regard, the focus was not on the Applicant's own athletic career, which significantly predates the relevant time period, but on his participation in athletics as a coach.

(A) Self-Employment

[24] For the reasons that follow, I do not find the Applicant's arguments regarding his self-employment in China persuasive. The Officer's conclusion that the Applicant had not established the required relevant experience of two years of self-employment in athletics is consistent with the evidence in the record. There was simply no evidence before the Officer that the Applicant is self-employed as a table tennis instructor in China and I find that the Officer reasonably concluded that the Applicant failed to demonstrate compliance with the requirements of the Regulations. The Decision was substantively justified in this regard and the Officer provided intelligible and transparent reasons in support of the conclusion that the Applicant is not self-employed.

[25] An applicant is required to establish two one-year periods of self-employment within the required time frame. The onus rests on the applicant to file an application that contains all relevant supporting documentation and to provide sufficient credible evidence in support of the application (*Oladipo v Canada (Citizenship and Immigration)*, 2008 FC 366 at para 24; *Ramezanpour v Canada (Citizenship and Immigration)*, 2016 FC 751 at para 35; *Singh v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 84 at para 39). If the applicant cannot do so, the application must be refused pursuant to subsection 100(2) of the Regulations.

[26] The Applicant argues that, because he does not have a written employment agreement with the Sports School, the Officer erred in finding that he is a salaried employee. However, the fact that an individual does not have an employment agreement with an employer but rather works on contract is not determinative of whether the individual is an employee or a self-employed contractor. Many people work on short- and long-term contracts but are nevertheless employees. It is necessary in each case to consider the structure of the relationship between the individual and the entity to which they provide services.

[27] The only documentary evidence of paid work submitted by the Applicant was the letter of reference from the Sports School which did not indicate whether he is an employee or an independent contractor. The letter confirms that the Applicant has been on contract with the school since June 2004 and that he receives an annual income and social insurance benefits, including medical insurance, as part of his contract. These facts suggest an employment relationship. The Officer's inference from the letter as to the nature of the Applicant's relationship with the school was not unreasonable.

[28] The Applicant has presented no evidence in support of the proposition that he is an independent contractor who happens to work on an extended basis at the Sports School. His evidence at the interview was that he provides instruction to his students every day after school. There is no suggestion in the record that he coaches other table tennis players outside of his work at the school. The fact that his coaching role at the school is his sole source of remuneration is also consistent with an employment relationship.

[29] The Applicant submits that the Officer should not have relied on the length of time during which he has worked with the Sports School or on the fact that he receives a stable annual income from the school. In my view, the Officer did not unduly rely on these elements of the Applicant's arrangements in concluding that he is an employee. The fact that he is a long-term coach at the school, receiving a salary and benefits as part of his contract, is relevant to an assessment of the nature of his relationship with the school.

[30] In his written submissions, the Applicant relies on what is stated to be the normal practice in North America regarding the status of professional sports coaches vis-à-vis the teams they coach. The Applicant refers to an online article regarding head coaches in the National Basketball Association who earn a fixed salary plus bonuses. This argument was not maintained before me and with good reason. A North American practice regarding the payment of professional sports coaches is not relevant to the issue of whether the Applicant established that he was self-employed teaching table tennis at a school in China.

[31] Finally, the Applicant argues that the Officer misinterpreted subsections 100(1) and 88(1) of the Regulations. He submits that the sections are focused on an applicant's intention and ability to be self-employed in Canada and not on the particular legal or financial arrangements through which they are paid. However, the test in subsection 88(1) of the Regulations for a self-employed person has three elements, each of which must be satisfied:

1. the relevant experience as defined in subsection 88(1);
2. the intention and ability to be self-employed in Canada; and
3. the intention and ability to make a significant contribution to specified economic activities in Canada.

[32] The Applicant effectively argues that the absence of relevant experience of self-employment cannot be determinative of an application for permanent residence if the foreign national has an intention and ability to be self-employed in Canada. This argument cannot succeed. First, it ignores the clear wording of subsection 88(1) of the Regulations and the conjunctive nature of the test. Second, subsection 100(1) of the Regulations establishes the self-employed persons class for individuals who have the ability to become economically established in Canada *and* "who are self-employed persons within the meaning of subsection 88(1)".

[33] The Applicant relies on the case of *Guryeva v Canada (Citizenship and Immigration)*, 2015 FC 1103, for the proposition that an applicant may work in a full-time position unrelated to athletic endeavours but may yet satisfy the requirement of relevant experience by engaging in a sporting activity in their spare time. The issue in the Applicant's case is that his evidence is that his one paid position is at the Sports School. There is no evidence that he pursued work as a table tennis coach independent of his work at the school.

(B) Participation at a world class level in athletics

[34] The Applicant submits that the Officer ignored subparagraph (B) of the definition of "relevant experience" (athletics) in subsection 88(1) of the Regulations which permits a foreign national to satisfy the requirement of relevant experience as a self-employed person by having "two one-year periods of experience in participation at a world class level in athletics". The Applicant points to his letter of reference from the Sports School which lists the achievements of a number of his students at the national and international levels of table tennis competition. He also relies on a newspaper article in the record which names one of his students as a member of

the Singapore National Team. The Applicant states that the Officer's failure to assess this evidence against the requirements of subparagraph (B) results in an unreasonable decision that must be quashed.

[35] The Respondent emphasizes that the standard of review of the Decision is that of reasonableness and submits that it was reasonable for the Officer to find that coaching does not amount to participation at a world class level in athletics. The Respondent relies on the fact that the Officer raised this issue near the conclusion of the interview with the Applicant as follows:

> Your participation at a world-class level in athletics as a member of the China National Table Tennis Team was more than 15 years ago; this experience falls outside the period for assessment.

[36] The Applicant's argument turns on the fact that subparagraph (B) requires a foreign national to establish participation at a world class level in athletics during the relevant period. It does not require the foreign national to establish participation as a world class athlete during that period. Although the Applicant was unable to point to any jurisprudence which considers the breadth of the subparagraph, it is reasonable to assume that Parliament chose to draft the provision using the more general terminology and did not intend to constrain its scope to current world class athletes. In fact, in the context of an applicant's plan for self-sustainability in Canada, participation in business-related aspects of world class athletics may more obviously contribute to the viability of the applicant's plans for self-employment in Canada.

[37] The Officer raised the issue of the Applicant's participation in world class athletics in the interview but did so solely in the context of his status as an athlete. It is clear that the Officer did

not consider whether the Applicant's coaching experience during the relevant period could satisfy the requirements of subparagraph (B) of the definition of relevant experience (athletics).

[38] The evidence of the Applicant's experience coaching athletes who have enjoyed national and international success in table tennis competitions was squarely before the Officer in the letter of reference from the Sports School. I find that it was unreasonable for the Officer not to have considered that evidence against the requirements of subparagraph (B). Whether the Applicant's evidence in fact satisfies the subparagraph and establishes the Applicant's relevant experience for purposes of the Regulations was for the Officer to determine and will be the question for consideration by another visa officer upon redetermination of this matter.

2. Did the Officer breach the Applicant's right to procedural fairness by failing to ensure that the Applicant understood and responded to the concern that he was not self-employed?

[39] The Applicant submits that the Officer provided him no meaningful opportunity to address the concern that he was not a self-employed person. He states that the Officer summarized the concern at the end of the interview and, once the Applicant provided a response, concluded the interview without further inquiry. The Applicant also notes that he provided no response to the Officer's question as to whether he was an employee at the Sports School despite having no employment contract.

[40] I find that the Officer committed no breach of procedural fairness. The Applicant was fully informed prior to the interview that he would be required to demonstrate compliance with the selection criteria applicable to the self-employed persons class. He was asked for

documentation in support of his application in a letter dated June 21, 2018. The Applicant received a second letter dated August 3, 2018 which spoke to his responsibility to establish his compliance with the criteria and in which he was encouraged to bring relevant documentation to the interview. The selection criteria were explained to him and the definition of "relevant experience" was attached to the letter. At the interview, an interpreter was provided to the Applicant and he has raised no issue with respect to the competence and accuracy of the translation services provided to him.

[41] The GCMS notes indicate that the Officer summarized the specific concern regarding the Applicant's lack of evidence of self-employment and provided him an opportunity to respond (*Verghese v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 748 at para 8; see also, for example, *Lv v Canada (Citizenship and Immigration)*, 2018 FC 935 at paras 22-27). The Officer did not merely ask the Applicant if he had anything to add. The Applicant responded to the Officer's concern and the Officer was under no obligation to ask further questions. The onus was on the Applicant to provide a complete response. If he did not understand the question, which is not evident from the response given, the Applicant had the opportunity to ask for clarification.

VII. Conclusion

[42] The application will be allowed.

[43] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT in IMM-5376-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge