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2022 FC 1130

IMM-4055-21

Samat Serimbetov (*Applicant*)

v.

Minister of Immigration, Refugees and Citizenship Canada (*Respondent*)

IMM-4058-21

Andrey Chshelokovskiy (*Applicant*)

v.

Minister of Immigration, Refugees and Citizenship Canada (*Respondent*)

IMM-4064-21

Mikhail Kadymov (*Applicant*)

v.

Minister of Immigration, Refugees and Citizenship Canada (*Respondent*)

INDEXED AS: SERIMBETOV V. CANADA (IMMIGRATION, REFUGEES AND CITIZENSHIP)

Federal Court, Diner J.—Toronto, June 8 and July 28, 2022.

Citizenship and Immigration — Status in Canada — Permanent Residents — Business class applicants — Applications for judicial review concerning three work permit refusals (Decisions) by visa officer at Canadian Embassy in Warsaw, Poland (Officer) — Work permits were filed under Start-up Business Class (Program) — Three applicants all citizens of Kazakhstan, business partners who applied for Start-up Business Class Work Permits in conjunction with Program — Applicants sought to create company for purpose of designing, fabricating, selling self-sustained greenhouses — Applicants submitted application package for work permits under Program — Substantive reasons for Decisions, contained in refusal letters, Global Case Management System (GCMS) notes, were identical in all three files with minor exception — Officer found that applicants not eligible for C10 LMIA-exempt work permits for which they applied because in particular, applicants had not provided sufficient evidence of personal renown, expertise in their field, had not made efforts to first obtain LMIA — Officer thus not satisfied that work sought by applicants would create or maintain significant benefits or opportunities for Canadians, concluding that applicants not qualifying for C10

LMIA-exempt work permits under Immigration and Refugee Protection Regulations, s. 205(a) — Officer also determined that applicants not eligible for A75-coded Work Permits — Applicants subsequently submitted requests for their refusals to be reconsidered, asserting that Officer's refusal letters not adequately taking into account Program's requirements — However, reconsideration requests also refused — Refusal letters issued with respect to reconsideration simply stated that no error in fact, law or procedural fairness occurred — Judicial review was in relation to refusal to reconsider Decisions which referred to initial reasons — Main issue was whether Decisions reasonable — Officer's Decisions unreasonable — Despite applicants' argument about GCMS notes, such notes should, do form part of Decisions as held prior to and since Canada (Minister of Citizenship and Immigration) v. Vavilov — However, GCMS notes failed to acknowledge LMIA-exempt nature of Program, applied wrong assessment criteria for work permit at issue — It was unreasonable for Officer to rely on family ties, purpose of applicants' visit to conclude that applicants unlikely to leave Canada at end of authorized stay — Officer also failed to grapple with evidence on file; erred in factoring into refusal fact that applicants had not yet incorporated business — Officer's three decisions therefore had to be redetermined through different officer — Applications allowed.

These were applications for judicial review heard concurrently concerning three work permit refusals (the Decisions) by a visa officer at the Canadian Embassy in Warsaw, Poland (Officer). The work permits were filed under the Start-up Business Class (Program).

The three applicants are all citizens of Kazakhstan and business partners who applied for Start-up Business Class Work Permits in conjunction with the Program. The applicants sought to create a company for the purpose of designing, fabricating, and selling self-sustained greenhouses, named Modular Green Canada. The greenhouses would cultivate plants and fish using aquaponics and solar energy, which the applicants said would help to address food insecurity in Northern Canada by offering year-round production. Mr. Serimbetov was to have the role of Chief Executive Officer with 80 percent of the shares of the company; Mr. Chshelokovskiy, the role of Vice President of Business Development with 10 percent of the shares; and Mr. Kadymov, the role of Vice President of Finance with 10 percent of the shares. All three applicants hold a university degree and have experience in industry and management. In accordance with the requirements for work permits under the Program, each submitted an application package which included: (a) an undertaking to live in Manitoba; (b) proof of payment of the employer compliance fee; (c) a Commitment Certificate and Letter of Support from Manitoba Technology Accelerator, their designated entity (the Designated Entity) under the Program; (d) an IMM-5802 Form (Offer of Employment to a Foreign National Exempt from a Labour Market Impact Assessment (LMIA)); and (e) proof of sufficient funds. Counsel also provided detailed submissions explaining why each of the applicants qualified for a work permit. A letter from the Designated Entity provided as part of their supporting materials explained why the applicants were "essential" and the reasons for requesting early entry to Canada to begin work on their business.

The substantive reasons for the Decisions, contained in the refusal letters (Refusal Letters) and Global Case Management System (GCMS) notes, were identical in all three files with a minor exception. First, the Officer found that the applicants were not eligible for the C10 work permits for which they applied. C10 is a work permit coding for work permits that are exempt from a LMIA. The Officer further stated that all practical efforts to obtain an assessment from Employment and Social Development Canada (ESDC) should be made before a C10 exemption is requested. After assessing these criteria, the Officer determined that the applicants were not eligible for C10 LMIA-exempt work permits because they had not provided sufficient evidence of personal renown and expertise in their field, and had not made efforts to first obtain an LMIA. The Officer, as a result, was not satisfied that the work sought by the applicants would create or maintain significant benefits or opportunities for Canadians, concluding that the applicants did not qualify for C10 LMIA-exempt work permits under paragraph 205(a) of the *Immigration and Refugee Protection Regulations*. The Officer was not satisfied that the applicants would be able to perform the work sought or provide a significant benefit, as required by paragraphs 205(a) and 200(3)(a) of the Regulations. The Officer then assessed the applicants' eligibility for an A75-coded Work Permit and was unsatisfied that the purpose of the visit, employment situation in Kazakhstan (in regard solely to Mr. Serimbetov), and applicants' family ties, were sufficient to ensure departure from Canada at the end of the authorized

period of stay, as required by paragraph 200(1)(b) of the Regulations.

The applicants subsequently submitted requests for their refusals to be reconsidered, asserting that the Officer's refusal letters did not adequately take into account the requirements of the Program. These reconsideration requests were also refused. The refusal letters issued with respect to the reconsideration simply stated that no error in fact, law or procedural fairness occurred. The applicants argued that errors were made regarding (1) GCMS notes forming part of the decisions post- *Canada (Minister of Citizenship and Immigration) v. Vavilov*; (2) family ties and purpose of visit; (3) employment in the home country; (4) inability to perform the work sought; (5) the work permit category; (6) the lack of an incorporated business; and (7) the failure to request peer review. The judicial review was in relation to the refusal to reconsider the Decisions, which referred to the initial reasons, stating that they contained no errors. Also, this was the first judicial review application challenging work permit refusals under the Program. A review of the Start-Up Business Class Program was made.

The main issue herein was whether the Decisions were reasonable.

Held, the applications should be allowed. [Judgment]

The applicants submitted in particular that GCMS notes not communicated to an applicant do not form part of the reasons or justify the refusal of the applicants' work permits and that this was in accordance with *Vavilov*. They noted that *Vavilov* stated that formal reasons that do not justify a decision cannot be upheld on the basis of internal records that were not available to the affected party. This argument was, however, rejected. GCMS notes should and do form part of the Decisions, as has been consistently held both prior to *Vavilov* and since. Nonetheless, the applicants were right in stating that the Officer made other unreasonable findings.

Regarding family ties and purpose of visit, it was unreasonable for the Officer to rely on (a) family ties, and (b) purpose of the applicants' visit, to conclude that they were unlikely to leave Canada at the end of their authorized stay. The Program has as its primary objective permanent residence in Canada on the basis of start-up entrepreneurship. As such, the refusals on the basis of family ties—absent reasonable justification for this basis of refusal—when the work permit applications were expressly intended as a precursor to a forthcoming permanent residency application, was not only inconsistent with the purpose of the Program, but it was also illogical. For the same reasons, the Officer's consideration of the purpose of the applicants' visit was unreasonable, as guidance from Immigration, Refugees and Citizenship Canada (IRCC) indicates that work permits allow applicants to enter Canada and begin working while their application for permanent residence is still pending (Application Guide, at section 6.5). This is the exact purpose that the applicants sought to pursue in their applications and for which due diligence had already been conducted by the Designated Entity. The Decisions also lacked reasonable justification as a basis for refusal. In the absence of any other indication of why the Officer was not satisfied the applicants would leave Canada at the end of the period authorized for their stay, the Officer's Decisions were both lacking in rationale and justification given the parameters of the Program and the work permits filed under it. As to employment in Kazakhstan, it was unreasonable to find that Mr. Serimbetov would be unlikely to leave Canada at the end of his authorized stay due to his previous employment situation. Again, this ran counter to the whole purpose of the work permit application.

With respect to the Officer's finding that the applicants were unable to "perform the work sought", the Officer failed to grapple with the evidence on file, and most particularly, the documentation from the Designated Entity supporting the immediate presence requirement for the purposes of their work permits (through the Letters of Support) and the start-up business (through the Commitment Certificates). Furthermore, the Officer did not address why the applicants would not be able to undertake the job descriptions contained in section 5.3 of the Commitment Certificates, in light of their experience and education. The Officer also found, for each of the three applicants, that they had not submitted proof of language scores. While language proficiency is a requirement for permanent residency under the Program, it is not required with an application for a work permit.

As to the LMIA-exempt work permit, the applicants argued that it was also unreasonable for the Officer to fault them for failing to have attempted to obtain an LMIA before applying for an LMIA-exempt work permit. They submitted that this was another indication that the Officer failed to appreciate both the purpose of the Program and work permits issued under it. The guidance makes it clear (in both the Overview and Application Guide) that the work permit is to be issued on an LMIA-exempt basis. The GCMS notes, however, failed to acknowledge the LMIA-exempt nature of the Program and applied the wrong assessment criteria for such a work permit in stating that "all practical efforts to obtain ESDC's assessment should be made before C10 is applied."

Also, the Officer unreasonably erred in factoring into the refusal the fact that the applicants had not yet incorporated their business. First, the work permit applications each indicate that the applicants intend to incorporate their business upon arrival in Canada. Second, even the permanent residence application stage expressly permits applicants to incorporate a business subsequent to entering Canada, as long as an applicant demonstrates the intention to incorporate after the approval of permanent residence (Regulations, subsection 98.06(2)). And finally, with respect to the peer review mechanism, the applicants were right in contending that it was unreasonable for the Officer to find that they did not meet the Program requirements and could not perform the work sought without triggering a peer review, as they assert this was beyond the scope of the Officer's purview under the regulatory scheme of the Program. Peer review is not mandatory under section 98.09 of the Regulations, which states that an officer "may request" an independent assessment by a peer review panel. Furthermore, the officer is not bound by its assessment (subsection 98.09(4)). In short, while the failure to trigger a peer review did not render the Decisions unreasonable in this case, other aspects of them did.

The Officer's three decisions were unreasonable and the files had to be redetermined through a different officer.

STATUTES AND REGULATIONS CITED

Immigration and Refugee Protection Regulations, SOR/2002-227, ss. 89, 98, 98.01(1),(2), 98.02(1)(d), 98.03, 98.04, 98.06, 98.09, 98.10, 200(1)(b),(3)(a), 205(a).

Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 22(2).

Federal Courts Citizenship, Immigration and Refugee Protection Rules, SOR/93-22, r. 22.

CASES CITED

APPLIED:

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, [2019] 4 S.C.R. 653; *Shekhtman v. Canada (Citizenship and Immigration)*, 2018 FC 964, 49 Admin. L.R. (6th) 12.

REFERRED TO:

Nguyen v. Canada (Citizenship and Immigration), 2019 FC 439, 68 Imm. L.R. (4th) 156; *Crudu v. Canada (Citizenship and Immigration)*, 2019 FC 834; *Emuze v. Canada (Citizenship and Immigration)*, 2021 FC 894, 83 Imm. L.R. (4th) 297; *Ezou v. Canada (Citizenship and Immigration)*, 2021 FC 251; *Rabbani v. Canada (Citizenship and Immigration)*, 2020 FC 257; *Gulati v. Canada (Citizenship and Immigration)*, 2021 FC 1358; *Rosenberry v. Canada (Citizenship and Immigration)*, 2012 FC 521, 409 F.T.R. 191; *Canada (Minister of Human Resources Development) v. Rafuse*, 2002 FCA 31, 286 N.R. 385, [2002] 2 F.C. D-9.

AUTHORS CITED

Canada Gazette, Part II, Vol. 152, No. 9, May 2, 2018.

House of Commons. *Standing Committee on Citizenship and Immigration. Evidence*, 41st Parl.,

2nd Sess., No. 7 (November 28, 2013), online: https://www.ourcommons.ca/DocumentViewer/en/41-2/CIMM/meeting-7/evidence.

Immigration, Refugees and Citizenship Canada. Operational Instructions and Guidelines. "Foreign workers: Work permits for start-up business class permanent resident visa applicants" (17 May 2019), online: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/provincial-nominees-permanent-resident-applicants/work-permits-start-business-class-permanent-resident-visa-applicants.html.

Immigration, Refugees and Citizenship Canada, "Work permits for Start-Up Visa applicants" (13 June 2019), online: https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/start-visa/work-permits.html#1.0.

APPLICATIONS for judicial review concerning the refusals, by a visa officer at the Canadian Embassy in Poland, of three work permits filed under the Start-up Business Class Program. Applications allowed.

APPEARANCES

Zohra Jaffer and *Justin Kutyan* for applicants.

Laoura Christodoulides for respondent.

SOLICITORS OF RECORD

KPMG Law LLP, Toronto, for applicants.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment and judgment rendered in English by

DINER J:

I. Introduction

[1] This case concerns three applications for judicial review, heard concurrently, concerning three work permit refusals (the Decisions) by a visa officer at the Canadian Embassy in Warsaw, Poland (Officer). The work permits were filed under the Start-up Business Class (Program). For the reasons below, all three applications will be granted.

II. Factual Background

[2] Samat Serimbetov, Andrey Chshelokovskiy, and Mikhail Kadymov (the applicants) are all citizens of Kazakhstan and business partners who applied for Start-up Business Class Work Permits in conjunction with the Program. The applicants sought to create a company for the purpose of designing, fabricating, and selling self-sustained greenhouses, named Modular Green Canada. The greenhouses would cultivate plants and fish using aquaponics and solar energy, which the applicants say will help to address food insecurity in Northern Canada by offering year-round production. Mr. Serimbetov was to have the role of Chief Executive Officer with 80 percent of the shares of the company; Mr. Chshelokovskiy, the role of Vice President of Business Development with 10 percent of the shares; and Mr. Kadymov, the role of Vice President of Finance with 10 percent of the shares.

[3] All three applicants hold a university degree and have experience in industry and management. In accordance with the requirements for work permits under the Program, each submitted an application package which included: (a) an undertaking to live in Manitoba; (b) proof of payment of the employer compliance fee; (c) a Commitment Certificate and Letter of Support from Manitoba Technology Accelerator, their designated entity (the Designated Entity) under the Program; (d) an IMM-5802 Form (Offer of Employment to a Foreign National Exempt from a Labour Market Impact Assessment); and (e) proof of sufficient funds. Counsel also provided detailed submissions explaining why each of the applicants qualified for a work permit.

[4] A letter from the Designated Entity provided as part of their supporting materials explained why the applicants were "essential", and the reasons for requesting early entry to Canada to begin work on their business. The Designated Entity also confirmed their due diligence, noting that the applicants had sufficient financial resources to support themselves during the 52-week period for which their work permits were sought.

A. *Decisions under Review*

[5] All three work permit applications were refused. The substantive reasons for the Decisions, contained in the refusal letters (Refusal Letters) and Global Case Management System (GCMS) notes, were identical in all three files, except as noted below. A sample of the Refusal Letters is provided in Annex A to these Reasons.

[6] First, the Officer found that the applicants were not eligible for the C10 work permits for which they applied. C10 is a work permit coding for work permits that are exempt from a Labour Market Impact Assessment (LMIA).

[7] In the Decisions, the Officer noted that C10 LMIA-exempt work permits are intended to authorize entry to Canada for persons of international renown, where a person's presence in Canada is crucial to a high-profile event, and where circumstances have created urgency for the person's entry.

[8] The Officer further stated that all practical efforts to obtain an assessment from Employment and Social Development Canada (ESDC) should be made before a C10 exemption is requested, and that foreign nationals submitting an application for consideration under C10 should provide documentation supporting that they provide an important or notable contribution to the Canadian economy. The Officer also noted that the claimed contribution to the economy must be supported by the testimony of credible, trustworthy, and distinguished experts in the foreign national's field, by any objective evidence, and by an applicant's past record of distinguished achievement.

[9] After assessing these criteria, the Officer determined that the applicants were not eligible for C10 LMIA-exempt work permits, because they had not provided sufficient evidence of personal renown and expertise in their field, and had not made efforts to first obtain an LMIA. The Officer, as a result, was not satisfied that the work sought by the applicants would create or maintain significant benefits or opportunities for Canadians, concluding that the applicants did not qualify for C10 LMIA-exempt work permits under paragraph 205(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations; in these reasons, I will refer to provisions in the Regulations with the prefix "R") (see relevant provisions at Annex B).

[10] The Officer then assessed the applicants' eligibility for an A75-coded Work Permit, and found that:

- the applicants do not hold relevant education or employment in the fields of horticulture, greenhouses, or the food industry, nor in the case of Mr. Kadymov, product design or entrepreneurship;
- while the applicants indicated that greenhouses have been developed, there was no evidence on file to support their existence;
- Modular Green Canada, their intended start-up business, was not operational and the applicants indicated that this company would not be incorporated until their permanent resident applications were approved;
- the intended market for the project aimed at food insecurity was unclear;
- there was no business plan on file and the source of sales projections was not identified;
- it was unclear why the applicants are required to enter Canada to run the business given the above observations.

[11] In light of these concerns, the Officer was not satisfied that the applicants would be able to perform the work sought or provide a significant benefit, as required by R205(a) and R200(3)(a) of the Regulations. The Officer was also unsatisfied that the purpose of the visit, employment situation in Kazakhstan (in regard solely to Mr. Serimbetov), and applicants' family ties, were sufficient to ensure departure from Canada at the end of the authorized period of stay, as required by R200(1)(b).

[12] The applicants subsequently submitted requests for their refusals to be reconsidered, asserting that the Officer's refusal letters did not adequately take into account the requirements of the Program. These reconsideration requests were refused on April 20, 2021. The refusal letters issued with respect to the reconsideration simply state that no error in fact, law or procedural fairness occurred.

[13] Before moving onto the issues that the applicants raise with respect to the Decisions, I will briefly summarize the Program.

B. *The Program*

[14] The parties advise that this is the first judicial review application challenging work permit refusals under the Program, and that is also borne out by my research. I will briefly review the Program background, which is important for the context of how work permits are issued under it. The following summary, unless otherwise specified, is gleaned from the various provisions contained in R89 and R98 of the Regulations, along with the Regulatory Impact Analysis Statement (RIAS) (*Canada Gazette*, Part II, Vol. 152, No. 9, May 2, 2018, at page 830).

[15] The Program was originally launched in 2013 as a pilot through Ministerial Instructions. The Program targets foreign entrepreneurs who want to launch their start-ups in Canada while gaining a direct pathway to permanent residence. Under the Program, designated entities, consisting of Minister-approved business incubators,

angel investor groups, or venture capital funds, assess the foreign entrepreneurs' business proposals to identify innovative ventures (see also *Nguyen v. Canada (Citizenship and Immigration)*, 2019 FC 439, 68 Imm. L.R. (4th) 156, at paragraph 3). When one of these designated entities identifies a promising applicant to support under the Program, it submits a Commitment Certificate to Immigration, Refugees and Citizenship Canada (IRCC), which confirms, among other things, that the designated entity has performed a due diligence assessment of the applicant and the start-up business.

[16] Specifically, R98.01(1) of the Regulations defines the Program "as a class of persons who may become permanent residents on the basis of their ability to become economically established in Canada, who meet the requirements of subsection (2) and who intend to reside in a province other than Quebec." The Program requirements of R98.01(2) are fourfold: (i) obtaining a commitment from a designated entity; (ii) attaining a certain level of language proficiency; (iii) having a certain amount of transferable and available funds; and, (iv) having a qualifying business as defined by R98.06 and R98.01(2).

[17] As a further requirement, under R89(b) of the Regulations, an applicant must satisfy an officer that their commitment made with a designated entity is primarily for the purpose of engaging in the business activity for which the commitment was intended, and not for the purpose of acquiring a status or privilege under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act). If an officer is of the opinion that an independent assessment would assist, a request may be made for a peer review panel (R98.02(1)(d) and R98.09). The Officer may also substitute their own evaluation of an applicant's ability to become economically established in Canada with the concurrence of a second officer (R98.10).

[18] It is evident from the scheme of the Regulations, as well as from the RIAS and publicly listed IRCC policy guidance, that the Program is first and foremost a permanent residence program. In a November 28, 2013 meeting of the Standing Committee on Citizenship and Immigration, the IRCC Minister noted that the Program is aimed at "ensuring that entrepreneurs […] are cleared to become a permanent resident once they do a deal with a venture capital partner, an angel investor, or an incubator. This gives us a particular focus on innovation and entrepreneurship" (November 28, 2013 meeting of the Standing Committee on Citizenship and Immigration, at page 2— https://www.ourcommons.ca/DocumentViewer/en/41-2/CIMM/meeting-7/evidence).

[19] Subsidiarily, the Program also offers temporary work permits to applicants prior to granting permanent residency. Neither the Regulations nor the initial Ministerial Instructions provide guidance on work permits issued under the Program. Rather guidance is provided on the IRCC website, which states that, "foreign nationals who have received a Commitment Certificate [and] Letter of Support issued by a designated entity" may apply before even submitting an application for permanent residence "in order to facilitate their entry to Canada" (IRCC, "*Foreign workers: Work permits for start-up business class permanent resident visa applicants*" (17 May 2019), (Overview) https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/provincial-nominees-permanent-resident-applicants/work-permits-start-business-class-permanent-resident-visa-applicants.html).

[20] Related guidance provides that applicants may begin working as entrepreneurs in the development of their business described in the Commitment Certificate before acquiring their permanent residence (IRCC, "*Work permits for Start-Up Visa applicants*" (13 June 2019), at section 6.5 (Application Guide) https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/start-visa/work-permits.html#1.0).

[21] According to the Overview, the eligibility requirements for work permits issued under the Program are that:

- the applicant intends to reside in a province or territory other than Quebec;
- an IMM-5802 (a form entitled "Offer of Employment to a Foreign National Exempt from a Labour Market Impact Assessment") has been completed by the foreign national as "self-employed" and the form and employer compliance fee have been submitted to IRCC;
- a Commitment Certificate must have been issued by a designated entity indicating that the work permit applicant is "essential" and there are urgent business reasons for the applicant's early entry to Canada (through the completion of section 8.0 of the Commitment Certificate);
- a Letter of Support linked to a Commitment Certificate has been issued by a designated entity;
- the applicant must have sufficient funds to meet the low income cut-off for their family size for a period of 52 weeks.

[22] Having reviewed the background of the three work permit applications at issue, along with providing an overview of the Program, I will now address the issues raised.

III. Issues and Analysis

[23] The applicants argue that errors were made regarding (1) GCMS notes forming part of the decisions post-*Vavilov*; (2) family ties and purpose of visit; (3) employment in the home country; (4) inability to perform the work sought; (5) the work permit category; (6) the lack of an incorporated business; and (7) the failure to request peer review. The parties agree that the reasonableness standard applies. As such, to withstand judicial review, the Court must find that the decision was based on an internally coherent and rational chain of analysis, justified under the facts and the law, in a manner that is intelligible and transparent (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 (*Vavilov*), at paragraphs 85 and 99).

A) *Two Preliminary Issues*

[24] Before addressing whether the Decisions were reasonable in light of the issues raised by the applicants, I will address two preliminary issues raised by the respondent, namely that this judicial review is flawed both due to: (i) the failure of the applicants to provide personal affidavits in support of their position, and (ii) the impermissible combination of two administrative decisions under one judicial review (i.e. the

applicants' challenge of both the refusal of the work permit and the reconsideration requests).

[25] On the first of these preliminary issues, an applicant's failure to include affidavits in an immigration application is not fatal (*Crudu v. Canada (Citizenship and Immigration)*, 2019 FC 834, at paragraph 26), especially where—as here—an application rests on a question of law, and the essential facts necessary for its determination are contained in the record (*Emuze v. Canada (Citizenship and Immigration)*, 2021 FC 894, 83 Imm. L.R. (4th) 297, at paragraph 13).

[26] As for the Decisions properly under review, I will consider this judicial review to be in relation to the refusal to reconsider the Decisions, which as noted above referred to the initial reasons, stating that they contained no errors. In the absence of written reasons for the reconsideration, and given that both parties at the hearing recognized that the reasons for the initial refusals are those that properly form the basis of this judicial review, I will now explain why the Decisions are unreasonable.

B) *The Officer's Decisions were unreasonable*

(1) GCMS notes should not form part of the decisions post-*Vavilov*

[27] The applicants take the position that GCMS notes not communicated to an applicant do not form part of the reasons or justify the refusal of the applicants' work permits. They note that in accordance with *Vavilov*, at paragraphs 84, 86 and 95, formal reasons that do not justify a decision cannot be upheld on the basis of internal records that were not available to the affected party. The applicants submit that the reasons contained in the Refusal Letters, which consist of four bulleted points, lack a rational chain of logic because they offer no reference to the Program or its specific requirements, and instead rely on irrelevant considerations, thus contradicting the guidance provided by IRCC.

[28] I disagree with the applicants and find that GCMS notes should and do form part of the Decisions, as has been consistently held both prior to *Vavilov*, and since (see for instance *Ezou v. Canada (Citizenship and Immigration)*, 2021 FC 251, at paragraph 17 and *Rabbani v. Canada (Citizenship and Immigration)*, 2020 FC 257, at paragraph 35). That said, I nonetheless agree with the applicants that the Officer made other unreasonable findings, which are reviewed next.

(2) Family ties and purpose of visit

[29] It was unreasonable for the Officer to rely on (a) family ties, and (b) purpose of the applicants' visit, to conclude that they were unlikely to leave Canada at the end of their authorized stay. The Program, as described above, has as its primary objective permanent residence in Canada on the basis of start-up entrepreneurship. As such, the refusals on the basis of family ties—absent reasonable justification for this basis of refusal—when the work permit applications were expressly intended as a precursor to a forthcoming permanent residency application, was not only inconsistent with the purpose of the Program, but it was also illogical. Indeed, this is a classic case of dual intent as permitted under subsection 22(2) of the Act. After all, the Program allows applicants to come to Canada on a work permit before submitting their application for

permanent residence, as long as they have a Commitment Certificate, along with a Support Letter from their designated entity.

[30] For the same reasons, the Officer's consideration of the purpose of the applicants' visit was unreasonable, as guidance from IRCC indicates that work permits allow applicants to enter Canada and begin working while their application for permanent residence is still pending (Application Guide, at section 6.5). This is the exact purpose that the applicants sought to pursue in their applications, and for which due diligence had already been conducted by the Designated Entity. If the Officer doubted their purpose in coming to Canada was for the establishment and launch of the business, or that a lack of due diligence had been done by the applicants, that should have been explained. Instead, the Decisions also lacked reasonable justification as a basis for refusal. An example of a reasonable justification for finding that the applicants were unlikely to leave Canada at the end of their authorized stay could have been, for instance, evidence of prior non-compliance with immigration laws (*Gulati v. Canada (Citizenship and Immigration)*, 2021 FC 1358, at paragraph 11; *Rosenberry v. Canada (Citizenship and Immigration)*, 2012 FC 521, 409 F.T.R. 191, at paragraph 115). However, there is no indication that any of these applicants have ever breached an immigration law and no justification was provided for any such concern.

[31] In the absence of any other indication of why the Officer was not satisfied the applicants would leave Canada at the end of the period authorized for their stay, I find the Officer's Decisions were both lacking in rationale and justification, given the parameters of the Program and the work permits filed under it.

(3) Employment in Kazakhstan (unique to Mr. Serimbetov's application)

[32] It was unreasonable to find that Mr. Serimbetov would be unlikely to leave Canada at the end of his authorized stay due to his previous employment situation. Again, this runs counter to the whole purpose of the work permit application, namely to begin the establishment of the start-up business, and remain in Canada focused on that new business on a permanent basis.

(4) Inability to perform the work sought

[33] I further agree with the applicants that the Officer, in finding that they were unable to "perform the work sought", failed to grapple with the evidence on file, and most particularly, the documentation from the Designated Entity supporting the immediate presence requirement for the purposes of their work permits (through the Letters of Support) and the start-up business (through the Commitment Certificates). Furthermore, the Officer did not address why the applicants would not be able to undertake the job descriptions contained in section 5.3 of the Commitment Certificates, in light of their experience and education.

[34] The Officer also found, for each of the three applicants, that they had not submitted proof of language scores. I note that while language proficiency is a requirement for permanent residency under the Program, it is not required with an application for a work permit. Certainly, an officer may consider language capability as part of the ability to perform the work sought, but here the Officer simply made the comment that IELTS (International English Language Testing System results) is "not on file and language ability is required." Perhaps the Officer was referring to language

results being required with the permanent residency application. Indeed, the Program criteria include demonstrating a median score of 5.0 on IELTS, a low score relative to other permanent residence programs.

[35] I make two remarks regarding the Officer's comments. First, had the designers of the Program wanted to create a language requirement on the adjunct work permit, they could have easily done so, just as they did in requiring an IELTS test to be submitted with the permanent residence application. However, there is no such requirement in the Regulations or work permit policy documents (the Overview or Application Guide).

[36] Second, even if there was a specific reason as to why a certain language proficiency was required under these specific circumstances, such as for the work tasks required to begin work on the business, and why the applicants fell short of that mark, the Officer needed to provide some justification or explanation to be transparent in the Decisions. The Officer did not do so, leaving the rationale unexplained. Again, in providing the Commitment Certificate and Letter of Support, the Designated Entity is expected to have done its due diligence on the start-up business and the applicants.

(5) LMIA-exempt work permit

[37] The applicants argue that it was also unreasonable for the Officer to fault the applicants for failing to have attempted to obtain an LMIA before applying for an LMIA-exempt work permit. They contend this is yet further indication that, when viewed in the context of the other findings, the Officer failed to appreciate both the purpose of the Program, and work permits issued under it. The applicants also contend that the Officer failed to explain why the C10 exemption code was not appropriate, given that IRCC has identified this code to be used for such applications. The Officer stated in the GCMS notes—in the same language for each of the three applicants:

> However, C10 LMIAE WP's are intended to authorize entry to Canada for persons of international renown, where a person's presence in Canada is crucial to a high-profile event, and whether circumstances have created urgency to the person's entry. In addition, all practical efforts to obtain ESDC's assessment should be made before C10 is applied. Foreign nationals submitting an application for consideration under C10 should provide documentation supporting their claim of providing an important or notable contribution to the Canadian economy. The foreign national's proposed benefit must be significant, meaning it must be important or notable, and supported by the testimony of credible, trustworthy, and distinguished experts in the foreign national's field and any objective evidence, and the PA's past record of distinguished achievement. However, [the Applicant] submitted insufficient evidence of personal renown and expertise in field, of expert testimony or of significant benefit, or that efforts were made to obtain ESDC assessment first. Therefore, [the Applicant] is not eligible for a C10 LMIAE WP.

[38] I note that in the Application Guide, C10 is identified as the appropriate code applicable to applications made pursuant to the Program. Thus, the work permit category was not chosen by the applicants, but rather pre-selected by IRCC. Again, C10 is an LMIA-exempt code pursuant to R205(a) of the Regulations, an exemption which provides that the foreign national "intends to perform work that… would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents."

[39] The plain language of R205(a) of the Regulations includes those who intend to perform work that would create or maintain significant economic benefits or

opportunities for Canadians. The Officer does not explain why or how this provision limits entry to, as the Officer stated in the Decisions, “persons of international renown, where a person’s presence in Canada is crucial to a high-profile event, and whether circumstances have created urgency to the person’s entry.” Likewise, the Officer provided no justification for limiting the interpretation of “significant, meaning it must be important or notable, and supported by the testimony of credible, trustworthy, and distinguished experts in the foreign national’s field and any objective evidence, and the PA’s past record of distinguished achievement.”

[40] Work permits under the Program are focused on the start-up business. The Program does not require, as an eligibility criterion, world-renowned experts coming to lend their names to institutions, businesses, entertainment productions, or academia. Rather, applicants are being brought to lend their skills to launch and run an innovative business idea, which has garnered the backing of a Designated Entity.

[41] I further note that beyond the unreasonable rationale pointed out above, even the Department’s guidance documents, which serve as a reference tool for visa officers, are inconsistent. Specifically, the Application Guide states at section 4.1.3 that the officer is to use the C10 coding (significant benefits). However, the Overview states that the officer is to use the A75 Coding (permanent resident facilitation, such as for bridging open work permits, for certain economic class permanent residence applicants). I note that it would be helpful for IRCC to clarify these inconsistent indications as to which Code their officers should be applying.

[42] Either way, the guidance makes it clear (in both the Overview and Application Guide) that the work permit is to be issued on an LMIA-exempt basis. The GCMS notes, however, fail to acknowledge the LMIA-exempt nature of the Program, and apply the wrong assessment criteria for such a work permit in stating that “all practical efforts to obtain ESDC’s assessment should be made before C10 is applied.” After all, an application for an LMIA would be refused for a business which had not fulfilled the minimum recruitment requirements, and which does not even yet exist. Indeed, the Officer’s statement that the applicants had failed to make efforts to obtain an LMIA is unreasonable, and also directly related to another unjustified statement of the Officer, regarding the lack of an incorporated business.

(6) Lack of an incorporated business

[43] The Officer unreasonably erred in factoring into the refusal the fact that the applicants had not yet incorporated their business. First, the work permit applications each indicate that the applicants intend to incorporate their business upon arrival in Canada. Second, even the permanent residence application stage expressly permits applicants to incorporate a business subsequent to entering Canada, as long as an applicant demonstrates the intention to incorporate after the approval of permanent residence (R98.06(2)).

[44] I note that unlike the detailed provisions of R98 relating to permanent residency applications under the Program, neither the Act nor Regulations comment on work permits issued under it. Rather, the only commentary specific to work permits are the policy statements set out in the guidance (Overview and Application Guide). The Application Guide expressly permits the request for work permits without the requirement of the business to be incorporated in Canada. This is yet another indication

that the Officer at best misapplied, and at worst misapprehended, the specific nature of these applications, and the broader parameters of the Program.

(7) Peer review mechanism

[45] Finally, the applicants contend that it was unreasonable for the Officer to find that they did not meet the Program requirements and could not perform the work sought without triggering a peer review, as they assert this was beyond the scope of the Officer's purview under the regulatory scheme of the Program. The applicants argue that under the Program, decisions on the suitability of applicants as industry experts are delegated to designated entities, and officers owe deference to the assessment of the designated entity in question. They submit that if the Officer had concerns with the due diligence or the validity of support offered by the Designated Entity in this case, a peer review should have been triggered under R98.09.

[46] I note that peer review is not mandatory under R98.09, which states that an officer "may request" an independent assessment by a peer review panel. Furthermore, the officer is not bound by its assessment (R98.09(4)).

[47] In short, while the failure to trigger a peer review did not render the Decisions unreasonable in this case, other aspects of it reviewed above did.

IV. Requests for the Court to Order the approval of the Work Permits and Issue Costs

[48] The applicants have requested that this Court order:

i. the visa office to issue the three work permits;

ii. in the alternative, redetermine the three files, making a decision on the work permits within 30 days of receipt of this order; and

iii. costs against the Minister.

[49] On the first request, as noted by Mr. Justice Gascon of this Court in *Shekhtman v. Canada (Citizenship and Immigration)*, 2018 FC 964, 49 Admin. L.R. (6th) 12, at paragraph 35, directed verdicts are "'an exceptional power that should be exercised only in the clearest of circumstances' and where the case is straightforward and the decision of the Court would be dispositive of the matter" (citing *Canada (Minister of Human Resources Development) v. Rafuse*, 2002 FCA 31, 286 N.R. 385, [2002] 2 F.C. D-9, at paragraph 14). Because this is not one of those cases, I would reject the applicants' request for a directed verdict and remit the matter to another officer.

[50] I am, however, willing to accede to the alternate request that processing be done in an expeditious manner, given the passage of time since the original filing of these applications. The applicants requested 30 days for a new decision on each of the work permit applications, while respondent's counsel requested a minimum of 90 days. I will provide the respondent Minister 60 days from the date of this Judgment and Reasons to redetermine these files.

[51] As for costs, despite granting the judicial review to the applicants, I am not satisfied that there are any special reasons to warrant an order as to costs in light of

rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22.

V. Conclusion

[52] For the rationale set out above, I am of the opinion that the Officer's Decisions were unreasonable and the three applications for judicial review will be granted.

[53] As the Decisions were the same for the three concurrently-heard files, my Judgment and Reasons apply equally to all three, and will accordingly be placed on each of Court files IMM-4055-21, IMM-4058-21, and IMM-4064-21.

JUDGMENT in IMM-4055-21, IMM-4058-21, IMM-4064-21

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review are granted.

2. The respondent shall have 60 days from the date of this Judgment to redetermine these files, through a different officer.

3. There will be no order as to costs.

4. The parties proposed no questions for certification and I agree that no such questions arise.

ANNEX A

Government of Canada / Gouvernement du Canada

PROTECTED - B

Date: February 26, 2021

UCI: 1116013151

Application no.: W305615220

SAMAT SERIMBETOV
23-MCRG. 11 BLDG. 60
AKTAU 130000
Kazakhstan

Dear SAMAT SERIMBETOV,

Thank you for your interest in working in Canada. After careful review of your work permit application and supporting documentation under the International Mobility Program, I have determined that your application does not meet the requirements of the Immigration and Refugee Protection Act (IRPA) and Immigration and Refugee Protection Regulations (IRPR). I am refusing your application on the following grounds:

- I am not satisfied that you will leave Canada at the end of your stay, as stipulated in subsection 200(1) of the IRPR, based on the purpose of your visit.
- I am not satisfied that you will leave Canada at the end of your stay, as stipulated in subsection 200(1) of the IRPR, based on your current employment situation.
- I am not satisfied that you will leave Canada at the end of your stay, as stipulated in subsection 200(1) of the IRPR, based on your family ties in Canada and in your country of residence.
- You were not able to demonstrate that you will be able to adequately perform the work you seek.
- Other: I am not satisfied that the work would create or maintain significant benefit or opportunities for Canadians and therefore, you do not qualify for a C10 LMIA exempt work permit under section 205(a)

You are welcome to reapply if you feel that you can respond to these concerns and can demonstrate that your situation meets the requirements. All new applications must be accompanied by a new processing fee.

Canada

IMM5621GEN (10-2017) E

Sincerely,

Embassy of Canada
Visa Section
ul. Piekna 2/8
00-481 Warsaw
Poland
Application Enquiry: https://secure.cic.gc.ca/enquiries-renseignements/case-cas-eng.aspx?mission=warsaw
www.poland.gc.ca
www.cic.gc.ca

Canada

ANNEX B

Immigration and Refugee Protection Regulations, SOR/2002-227

General

Artificial transactions

89 For the purposes of this Division, an applicant in the self-employed persons class or an applicant in the start-up business class is not considered to have met the applicable requirements of this Division if the fulfillment of those requirements is based on one or more transactions that were entered into primarily for the purpose of acquiring a status or privilege under the Act rather than

…

(b) in the case of an applicant in the start-up business class, for the purpose of engaging in the business activity for which a commitment referred to in paragraph 98.01(2)(a) was intended.

…

Start-up Business Class

Class

98.01 (1) For the purposes of subsection 12(2) of the Act, the start-up business class is prescribed as a class of persons who may become permanent residents on the basis of their ability to become economically established in Canada, who meet the requirements of subsection (2) and who intend to reside in a province other than Quebec.

Member of class

(2) A foreign national is a member of the start-up business class if

(a) they have obtained a commitment that is made by one or more entities designated under subsection 98.03(1), that is less than six months old on the date on which their application for a permanent resident visa is made and that meets the requirements of section 98.04;

(b) they have submitted the results of a language test that is approved under subsection 102.3(4), which results must be provided by an organization or institution that is designated under that subsection, be less than two years old on the date on which their application for a permanent resident visa is made and indicate that the foreign national has met at least benchmark level 5 in either official language for all four language skill areas, as set out in the *Canadian Language Benchmarks* or the *Niveaux de compétence linguistique canadiens*, as applicable;

(c) they have, excluding any investment made by a designated entity into their business, transferable and available funds unencumbered by debts or other obligations of an amount that is equal to one half of the amount identified, in the most recent edition of the publication concerning low income cut-offs published annually by Statistics Canada under the *Statistics Act*, for urban areas of residence of 500,000 persons or more, as the minimum amount of before-tax annual income that is necessary to support a group of persons equal in number to the total number of the applicant and their family members; and

(d) they have started a qualifying business within the meaning of section 98.06.

Size

(3) No more than five applicants are to be considered members of the start-up business class in respect of the same business.

Agreements with organizations

98.02 (1) The Minister may enter into an agreement with an organization to provide for any matter related to the start-up business class, including

(a) the making of recommendations and the provision of advice to the Minister on the designation of an entity and on the revocation of those designations;

(b) the establishment of criteria, standards of conduct and best practices for the making of commitments or the performance of other activities related to the start-up business class by an entity;

(c) the making of recommendations and the provision of advice to the Minister on the operation of these Regulations with respect to the start-up business class;

(d) the establishment of peer review panels referred to in section 98.09; and

(e) the submission of reports to the Minister on the activities of designated entities.

Requirements

(2) In order to exercise the functions referred to in paragraphs (1)(a), (b), (d) and (e), the organization must have expertise in relation to the type of entity in question, namely,

(a) business incubators;

(b) angel investor groups; or

(c) venture capital funds.

Conditions

(3) An organization may exercise the functions referred to in subsection (1) only when the following conditions apply:

(a) the organization is in compliance with the agreement and the agreement remains in force;

(b) subject to subsections 98.12(2) and 98.13(4), the organization complies with requirements imposed under subsection 98.12(1) and paragraphs 98.13(2)(b), (c), and (f) and requests made under subsection 98.13(3);

(c) the organization is in compliance with these Regulations; and

(d) the organization has expertise in relation to at least one of the entity types referred to in paragraphs (2)(a) to (c).

Designation

98.03 (1) The Minister must designate the entities referred to in subsection 98.01(2) according to the following categories:

(a) business incubators;

(b) angel investor groups; and

(c) venture capital funds.

Requirements

(2) The Minister may only designate an entity if

(a) it is recognized for its expertise in assessing the potential for and assisting in the success of start-up business opportunities in Canada; and

(b) it has the ability to assess the potential for and assist in the success of start-up business opportunities in Canada.

Conditions

(3) A designated entity must respect the following conditions:

(a) it must continue to meet the requirements of subsection (2);

(b) it must enter only into commitments that respect these Regulations;

(c) it must provide the Minister upon request with information on its activities related to the start-up business class, including information on foreign nationals with whom it has made commitments and the businesses referred to in those commitments;

(d) it must, subject to subsections 98.12(2) and 98.13(4), comply with requirements imposed under subsection 98.12(1) and paragraphs 98.13(2)(b), (c) and (f) and requests made under subsection 98.13(3);

(e) it must comply with the terms of its commitments and with these Regulations; and

(f) it must comply with any federal or provincial law or regulation relevant to the service it provides.

…

Form of commitment

98.04 (1) A commitment must be in a written or electronic form that is acceptable to the Minister and must be provided by a person who has the authority to bind the designated entity.

No fee for commitment

(2) A commitment does not respect these Regulations if the entity that made it charges a fee to review and assess the business proposal or to assess the business.

Multiple applicants

(3) If there is more than one applicant in respect of a commitment, the commitment must

(a) include information on each applicant; and

(b) identify those applicants that the entity making the commitment considers essential to the business.

Conditional commitment

(4) If there is more than one applicant in respect of a commitment, the commitment may be conditional on the issuance of a permanent resident visa to one or more of those applicants.

…

Qualifying business

98.06 (1) For the purposes of paragraph 98.01(2)(d), a qualifying business with respect to an applicant is one

(a) in which the applicant provides active and ongoing management from within Canada;

(b) for which an essential part of its operations is conducted in Canada;

(c) that is incorporated in Canada; and

(d) that has an ownership structure that complies with the percentages established under subsection (3).

Exception — intention

(2) A business that fails to meet one or more of the requirements of paragraphs (1)(a) to (c) is nevertheless a qualifying business if the applicant intends to have it meet those requirements after they have been issued a permanent resident visa.

…

Peer review

98.09 (1) An officer may request that a commitment, the applicants and designated entities party to the commitment and the qualifying business to which the commitment relates be independently assessed by a peer review panel established under an agreement referred to in section 98.02 by an organization that has expertise with respect to the type of entity making the commitment.

Grounds for request

(2) The request may be made if the officer is of the opinion that an independent assessment would assist in the application process. The request may also be made on a random basis.

Independent assessment

(3) The peer review panel's assessment must be independent and take industry standards into account.

Assessment not binding

(4) An officer who requests an independent assessment is not bound by it.

…

Issuance of Work Permits

Work permits

200 (1) Subject to subsections (2) and (3) — and, in respect of a foreign national who makes an application for a work permit before entering Canada, subject to section 87.3 of

the Act — an officer shall issue a work permit to a foreign national if, following an examination, it is established that

…

(b) the foreign national will leave Canada by the end of the period authorized for their stay under Division 2 of Part 9;

…

Exceptions

(3) An officer shall not issue a work permit to a foreign national if

(a) there are reasonable grounds to believe that the foreign national is unable to perform the work sought;

…

Canadian interests

205 A work permit may be issued under section 200 to a foreign national who intends to perform work that

(a) would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents;

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Temporary resident

22 (1) …

Dual intent

(2) An intention by a foreign national to become a permanent resident does not preclude them from becoming a temporary resident if the officer is satisfied that they will leave Canada by the end of the period authorized for their stay.