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"Qui bene interrogat bene docet" "He who questions well teaches well"

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The Use of the Term "Significant Economic Benefit" in Immigration Law

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NOTE: Part One of this article appeared in the previous issue of ImmQuest (Vol. 8, issue 9).

(Part Two)[1]

2.4. Case Law

2.4.1. *Momin v. Canada (Minister of Citizenship & Immigration)*[2]

In this pre-IRPA case, the applicant requested a judicial review of a refusal by a visa officer in Los Angeles. The visa officer mentioned in the refusal letter that the applicant's employment would not be able to create a "significant economic benefit" to Canada. The Applicant argued that the regulations at the time referred to "significant economic contribution" and not "significant economic benefit". The applicant argued that the term "contribution" as mentioned in the regulations at the time is defined in the Oxford Dictionary as, "pay or furnish", "pay or give jointly with others; supply" and "act of contributing". The applicant

1 Please note that this article consists of several parts and this release contains Part 2 of this article only – the third portion of this article will resume in the November issue of ImmQuest (8-11).

2 *Momin v. Canada (Minister of Citizenship & Immigration)*, 1999 CarswellNat 545, Doc. IMM-2904-98 (Fed. T.D.).

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said that the word "benefit" as used by the officer in the refusal letter means "do good to" or as an "advantage". The applicant mentioned the following in his affidavit: "To ask, as the respondent has done, that this business provide a significant benefit to Canada is to impose a higher bar for a benefit is simply quantitative measure but also a qualitative one". Therefore, the applicant argued that the officer made an error in law.

The respondent mentioned the following in his affidavit: "…and argument purely based on semantics is not sufficient grounds of review. Moreover, the respondent submits that the visa officer's reasons ought not be read microscopically, "…Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose the court should not intervene".

Madame Justice Reed mentioned the following in her decision:

> I am not persuaded that the visa officer misapplied the law when he used the word 'benefit' (significant economic benefit to Canada). The definition in the regulations speaks of 'a significant contribution to the economy ... of Canada.' The contribution must be a positive one. Thus, it is not incorrect to refer to it as a 'benefit'. Assessing whether or not a 'benefit' is likely to occur is not more subjective, nor is it a higher test than assessing whether a 'positive contribution' is likely to occur.

Comments:

Essentially, in this case the Judge held that "significant economic benefit" and "significant economic contribution" are synonyms, which is an important contribution to obtain a better understanding of the term "significant economic benefit."

2.4.2. *Chhibber v. Canada (Minister of Citizenship & Immigration)*[3]

In this case, a self-employed Citizen from India that owned a smoke shop in the United States applied for permanent residence in the self-employed class. The visa officer refused the case and subsequently the applicant requested a judicial review in Federal Court. The following is quoted from the case:

> [8] The visa officer denied the application for permanent residency. In the decision, the visa officer stated that the applicant did not have the ability to establish or purchase a business which will make a significant contribution to Canada's economy.
>
> [17] The Applicant did not seem to have a good knowledge of his business … with the assets that he has and his family responsibilities, I was of the opinion that he would not be able to purchase a business in Canada. I also advised the Applicant that I was of the opinion that he did not have the ability to establish a business in Canada which would make a significant contribution to the economy or the cultural or artistic life of Canada.
>
> [19] The income tax returns for the business for the years 1993, 1994 and 1995 show, as Counsel for the respondent states the business to be marginally profitable.
>
> [20] According to the U.S. Corporation Income Tax Return for the 1993 tax year, the M.M. Smoke Shop Inc. had gross sales of US $96,903 which left a gross profit of US $14,797 plus US $22,879 revenue from Lotto commissions for a total gross revenue of US$ 37,676 from which were deducted the expenses of US $35,351 leaving a taxable net of US $2,325.
>
> [21] This tax return shows Compensation of officers as US $9,120. I assume this is money paid to the applicant. Therefore the total net income available from the business for 1993 is US $11,445. Not a substantial amount of money to support a wife and children. It is not a substantial sum of money to show the capability to run a successful business.
>
> [22] For the year 1994, the tax return shows taxable income of US $1,109 plus Compensation of officers in the sum of US $9,120 for a total of US $10,229. The net is less than in 1993. Once again, not a sign of having the capability to run a successful business.

3 *Chhibber v. Canada (Minister of Citizenship & Immigration)*, 1998 CarswellNat 1410, Doc. IMM-2937-97 (Fed. T.D.).

[27] Neither party could submit any jurisprudence that defines the word "significant".

[28] Significant is defined in the American Heritage Dictionary as "important or notable" when used with "contribution". In the Shorter Oxford English Dictionary, Vol II, it is also defined as "important or notable".

[29] I fail to see how, by opening a smoke shop, the applicant will make an important or notable contribution to the economy of Canada. I fully understand that one need not show that the business would give employment to many persons to become a significant contributor to Canada's economy, but the evidence does not show the applicant would hire a single Canadian.

Comments:

- It is interesting to note that Justice Max Teitelbaum mentioned that neither party defined "significant economic benefit", although the nexus of the case was about significant economic benefit. Significant benefit through the judge's use and multiple references to dictionary definitions of "significant", continuously found to mean *"notable or important"*.
- The visa officer said "…ability to establish or purchase a business which will make a significant contribution to Canada's economy". This sentence emphasizes the point which is made further down: establishment of the business and a demonstrating significant economic benefit cannot be separated and are closely linked.
- Several aspects were listed by the officer in the motivation of the refusal. Although the factors discussed do not define "significant economic benefit" itself, it could be seen as *pre-requisites* or conditions that should exist before making a significant benefit argument or attempting to demonstrate that it might obtained in the future:
    - The foreign national should have a "good knowledge of his business" it would be safe to assume of the industry in which this business is operating, both outside and inside of Canada.
    - Furthermore, it is clear that previous performance in a business outside of Canada with specific reference to profitability is an important factor to be discussed in cases where significant economic benefit is to play a role in the motivation for a visa.
    - The profit made in the company overseas must be enough to support a wife and child in the country where the profits are made. Therefore, previous financial performance is one of the building blocks that should be discussed when arguments are made in support of future possible "significant economic benefit".
    - The projected number of Canadians to be employed will be a factor to support the existence of a significant economic contribution.

2.4.3. *Pourkazemi v. Canada (Minister of Citizenship & Immigration)*[4]

An Iranian Citizen owned a tobacco shop and later another shop selling newspapers in Hamburg, Germany. He then applied to come to Canada in the self-employed class. The request for a judicial review was refused and in the judgment the following was mentioned:

[3] The applicant challenges the visa officer's decision on two grounds. Firstly, he argues that the visa officer erred in law in her failure to apply properly section 8 of the *Immigration Regulations*. According to the applicant, the visa officer should have assessed his ability to become "successfully established" in his intended business in Canada pursuant to subsection 8(4) of the Regulations, instead of wrongly focusing on whether his convenience store would make "a significant contribution to the economy" of Canada within the meaning of the definition of "self-employed person". Secondly, the visa officer breached the rules of procedural fairness: (a) in her assessment of the significant economic contribution the applicant's intended self-employment would bring to Canada; (b) in her undue focus on the need to conduct comprehensive market research; and (c) in not providing the applicant a fair opportunity to respond to information she received from the Ontario Ministry of Industry and Business. Each of these two grounds will be considered in turn.

[7] The definition of "self-employed person" raises at least two tests: (a) does the applicant have the ability to establish

4 *Pourkazemi v. Canada (Minister of Citizenship & Immigration)*, 1998 CarswellNat 2296, [1998] F.C.J. No. 1665, 161 F.T.R. 62 (Fed. T.D.).

the intended business in Canada; and (b) will that business make a significant contribution to the economy of Canada?

[8] In this case, the visa officer answered both questions in the negative. This is set out in her CAIPS notes, in her letter of decision and in her affidavit and cross-examination. The applicant had not visited Canada and had no business contacts here. He had not targeted a business for acquisition nor identified premises to establish one. He was unaware of convenience store hours in Canada or of the cost of purchasing such a business. He had no information concerning the success of similar enterprises in this country. He also noted that he might subsequently establish an export-import or foreign trade business in Canada. With this information, the visa officer concluded that his proposed business was not likely to be successful or viable. She further concluded, under the second test, that the intended business would not make a significant contribution to the economy of Canada.

[9] The applicant's principal challenge is that the visa officer focused unduly on the criteria of the "significant contribution to the economy" of Canada. This submission is twofold.

[14] The test of "significant contribution to the economy of Canada" is included in the definitions of both "self-employed person" and "entrepreneur". Both definitions also speak of the immigrant's intention to establish a business. The same is not true for the investor category where certain investments must be made prior to the issuance of the visa. The applicant argues that the visa officer ought not to refer to the definition of "self-employed person" because the words "intends to be" are found in subparagraph 8(1)(*b*) and not in subparagraph 8(1)(*c*). This would result in circumventing the test of "significant benefit to the economy of Canada", at least for self-employed persons. I do not understand how the words "intends to be" can do away with the significant contribution test, and particularly so for one category of immigrant but not another. The difference in wording does not lead to the consequence urged by the applicant.

[15] In support of his submissions that the visa officer is not to refer to the significant contribution test, the applicant also relies on this statement of my colleague Justice MacKay in *Grube* v. *Canada (Minister of Citizenship and Immigration):*

> "The term 'self-employed person' is defined in the regulations but only in general terms relating to the intent and ability of the prospective immigrant, 'to establish or purchase a business in Canada that will create an employment opportunity for [the immigrant] and will make a significant contribution to the economy or the cultural or artistic life of Canada.' Assessing that intent and ability is then to be done in accord with the factors listed in column I of Schedule I other than factor 5. Little or no guidance is provided by the Regulations about the process of assessing those factors."

There is nothing in this statement, particularly when the decision is read in its entirety, to suggest that Justice MacKay had concluded that the regulatory definition was to be ignored.

[17] I understand this to mean, for example, that a convenience store may, in a certain "area of destination" make a "specific contribution" where the same may not be true in Toronto. In this regard, the visa officer advised the applicant that she would be communicating with the Ontario Ministry of Industry and Business simply to confirm, "out of an abundance of caution", her perception that "convenience stores were not needed in Toronto". The facts in *Muliadi v. Canada (Minister of Employment and Immigration)* are substantially different from those in this case. Finally, the visa officer questioned the applicant concerning his "market research". The visa officer's CAIPS notes indicate her concern for the applicant never having visited Canada, his limited information concerning his intended business and his alternative intention to establish an export-import business. Put differently, the visa officer appears to have been of the view that the applicant had not focused sufficiently on his business plan. It was open to her to reach such a conclusion on the evidence in this case"

Comments:

- In this case, Judge Lutfy mentioned that two tests must be met: Firstly the establishment of a business) and secondly the test of "significant economic benefit". The visa officer addressed both tests. Although one might want to review the court's decision about the *significant economic* test and ignore the establishment test, the two cannot easily be separated. When arguing significant economic benefit in the case of a Federal Entrepreneur or Provincial Entrepreneur pursuant to IRPR 205(a), it would be wise to refer to case law in terms of *both* tests as they are essentially two sides of the same coin.

- Justice Lutfy's case saw the concept of "significant economic benefit" as fluid and as dependent on the facts of each case. Therefore, significant benefit must be argued within the relevant geographical and other factors of each case.
- Once again, significant benefit is not defined but several factors are listed that should be touched upon during arguments of significant economic benefit:
    - evidence of market research, establishment of contacts, prior visits should be addressed as part of arguments of significant economic benefit;
    - knowledge of the Canadian industry which is to be entered would also be important; and
    - a business plan would be an important factor to be discussed as well.

2.4.4. *Grieser v. Canada (Citizenship and Immigration)*[5]

In this pre-IRPA case before the IRB, during the late 1990s, adjudicator Nupponen had to decide whether an entrepreneur couple knowingly contravened any laws and regulations. The adjudicator mentioned the following:

> Paragraph 23.1(1)(a) of the Immigration Regulations at the time, as well as the Universal Terms and Conditions, require that the venture make a *significant contribution to the economy* of Canada whereby employment opportunities are created or continued for one or more Canadian citizens or permanent residents. The question of whether employment opportunities were created or continued by the entrepreneur is generally considered in the course of determining whether there has been a significant contribution to the economy, and is not generally evaluated independently.
>
> In this case, no employees in the traditional sense were hired. However, as Theobald himself was not trained in construction trades, some 13 ready, willing and able tradesmen (framers, plumbers, electricians etc.) were engaged. Total wages paid were in excess of $41,000.00. While Theobald testified that the tradesmen were paid in cash and no records were adduced in evidence, his testimony was credible and trustworthy and required no further verification. He was confident that the tradesmen were either Canadian citizens or permanent residents and clearly felt that their employment was creating an *economic benefit* both to them, and to Canada
>
> Common sense dictates that "significant contribution to the economy" needs to be analysed in the context of the specific environment in which the venture was to be established. Immigration officials in Germany must have concluded that a plan for an appliance repair business/B&B in a rural Canadian setting was reasonable and would constitute a significant contribution to the economy. It would seem logical and likely that expectations were not lofty as to what the entrepreneurs could reasonably accomplish with such a modest proposal within the 2-year timeframe. Logic dictates that the expectations of such a venture in a rural setting would likely be different in character from those arising from a venture in a thriving urban setting.
>
> While the Griesers' contribution to the Canadian economy was not lofty, I cannot conclude that it was outside the likely scope of the original proposal. In addition, they most certainly contributed to the continued employment of a number of citizens/permanent residents. The Griesers have satisfied me that they have made a significant contribution to the economy of Canada and have therefore not contravened that term/condition. The allegation is therefore not founded.

Comments:

Similar to the case of *Lin v. Canada (Minister of Citizenship & Immigration)*[6] and *Zheng v. Canada (Minister of Citizenship & Immigration)*[7], the adjudicator held that whether the applicant complied with his conditions and made a "significant economic contribution" or not, is relative to the circumstance of the case and the region where the business is established.

2.4.5. *Liu v. Canada (Minister of Citizenship & Immigration)*[8]

Madam Justice Dawson mentioned the following:

> The visa officer imported extraneous criteria into her assessment in the self-employed category including a requirement for written business plan, knowledge of competition or general business climate in Toronto, managerial training and experience, business preparation, and that she not subcontract duties;

5 *Grieser v. Canada (Citizenship and Immigration)*, 2001 CanLII 26667 (IRB), online: CanLII <http://canlii.ca/t/1t462>.

6 *Infra* note 13.

7 *Infra* note 16.

8 *Liu v. Canada (Minister of Citizenship & Immigration)*, 2001 FCT 380, 2001 CarswellNat 896 (Fed. T.D.).

iii) The visa officer erred in the assessment as an entrepreneur because she ought to have found that Ms. Liu's resources were said to be sufficient to open the business and the visa officer further erred in assuming or requiring that the business would be operated immediately upon immigration to Canada.

In my view, the factors considered by the visa officer as listed above, and now impugned by Ms. Liu, were all relevant to and directed to the purpose of discerning whether Ms. Liu had the ability to establish a business in Canada, thereby meeting the definition of a self-employed person.

[7] Finally, with respect to the assessment of Ms. Liu in the entrepreneur category, I am satisfied that the visa officer's conclusion regarding Ms. Liu's financial and other ability to establish a business or commercial venture was not so unreasonable as to warrant judicial intervention. I cannot find that she considered irrelevant factors or ignored relevant factors or required that the business be operated immediately upon Ms. Liu's arrival in Canada. While I agree with counsel for Ms. Liu that it would have been open to the visa officer to have reached the opposite conclusion, I find no basis on which to set aside the visa officer's decision.

Comments:

In this case, the visa officer refused the case as the applicant did not have sufficient "written business plan, knowledge of competition or general business climate in Toronto, managerial training and experience, business preparation". Once again, "significant economic benefit" was not defined itself but certain building blocks or pre-requisites have been identified that would be crucial before attempts can be made to demonstrate the ability to achieve significant economic benefit in the future.

2.4.6. *Khan c. Canada (Ministre de la Citoyenneté & de l'Immigration)*[9]

This was an application for judicial review from a decision by a visa officer of the Canadian High Commission in Singapore on August 24, 2000, dismissing the application filed by the plaintiff for permanent residence in the "entrepreneur" class.

In the refusal of the visa, the officer said the following:

Although I believe you have had a successful career in Pakistan in the construction business, and you are well educated and speak English fluently, you were unable to convince me at interview that you have the intention and the ability to establish a business in Canada, or more specifically in Halifax, Nova Scotia, your intended destination in Canada. I asked you several specific questions about your business plan for Canada. You told me you want to establish a property development company in Halifax. You specifically chose Halifax because it is a small city and the economic development office there answered your query in six days. However, when I asked about specifics regarding your business plan you were unable to answer any of my questions. A sample of which follows: Who are the competitors you will face in the local property development business? How much does it cost to build a home in Halifax? What about cold weather construction techniques? How will you raise capital to finance a property development business?

The court found that the officer used her discretion in accordance with the principles of natural justice and the request for a reconsideration was refused.

Comments:

The officer based the refusal on the first test of an entrepreneur (establishment of a business) and did not address the second test of "significant economic contribution". The lack of research and planning by the appellant convinced the officer that the appellant could not have made a significant economic contribution in the area of Halifax. Therefore, this judgment does not speak directly to what significant economic benefit could mean, but it once again indicates certain building blocks or pre-requisites that should be addressed in the arguments of significant economic benefit. The pre-requisites include solid market research, existence of business plans, analyses of competition, etc. When significant economic benefit is argued in a submission for an intra-company transferee, then these factors (market research, business plan, analyses of competition) is not required, but would be crucial for a request for nomination as a provincial nominee.

9 *Khan c. Canada (Ministre de la Citoyenneté & de l'Immigration)* (7 décembre 2000), 2000 CarswellNat 3386, 2000 CarswellNat 3083, no IMM-4912-99 (Fed. T.D.).

2.4.7. *Tai Sun Chan v Minister of Employment and Immigration*[10]

Chan, a citizen of Hong Kong, was a landed immigrant and conditions were attached to his visa. An immigration officer refused to remove the conditions and Chan sought a judicial review. In the refusal, the officer mentioned that the educational business Chan had invested in was not a viable business and not a priority business by both the federal and provincial governments and provided no significant benefit to the country of Canada. The business in which Chan had invested had also gone bankrupt. The judicial review was successful and the matter was referred back for reconsideration.

In the judgment, the following was mentioned:

> The notions of a significant contribution to the economy or the continuation of employment are not 'snap shot' events such as entering into a marriage, but on-going circumstances and require a more long term assessment.

Comments:

Similar to the case of *Pourkazemi v. Canada (Minister of Citizenship & Immigration)*[11], the analyses of "significant economic benefit" require an on-going and long-term view of the term "significant economic benefit". The fact that business has gone bankrupt does not mean that the conditions were not met. Although the officer did not provide research to the claim that education was not a governmental priority, applicants could refer to governmental priorities (federal, provincial and municipal) when submissions are made about significant economic benefit.

2.4.8. *Chiu v. Canada (Minister of Citizenship & Immigration)*[12]

Mr. Chiu, a Vietnamese entrepreneur, applied for a permanent residence visa as an entrepreneur to start a travel business in Vancouver. The request was denied and the officer mentioned the following in the refusal:

a. Chiu did not bring any evidence to the interview;

b. He admitted to not having completed any research in the travel business;

c. He did not know how many travel agencies existed in Vancouver and how many facilitated travel to Vietnam;

d. He did not have a business plan; and

e. He had no idea of the competition he would face in his new business venture and if it existed how he would meet it effectively.

Comments:

Similar to many other cases, the issues mentioned by the visa officer are all pre-requisites before attempting to demonstrate significant economic benefit. Most importantly, the officer mentioned that the analysis of competition is important in these types of cases.

2.4.9. *Lin v. Canada (Minister of Citizenship & Immigration)*[13]

Mr. Lin, a Chinese national, lived in the United States from 1992 until the case was heard in Federal Court during 2001. His application for permanent residence as a self-employed person was refused, and in the refusal the visa officer mentioned the following:

a. Lin did not demonstrate he had the intention or ability to establish a business;

b. Simply providing food by itself does not represent a significant economic benefit; and

c. He had no working knowledge of English or French.

Judge Dawson referred to the case of *Zhao v Canada (Minister of Citizenship and Immigration)*[14] where the judge mentioned that the choice of occupation of a self-employed person or the business to be started (by itself) does not imply that significant economic benefit can be achieved as all cases are relative and depend on the specific circumstances of the case. The request for the judicial review was dismissed.

Comments:

Some of the pre-requisites of demonstrating significant economic benefit would include the ability to communicate in English (within the context of the other factors of the case). Also, the arguments about the ability to make a significant economic contribution

10 *Chan v Minister of Employment and Immigration,* 1994, FCT, Docket T-1825-92, as reported in *Federal Trail Reports* (79 F.T.R. 263).
11 *Supra* note 4.
12 *Chiu v. Canada (Minister of Citizenship & Immigration)*, 1996 CarswellNat 1925, [1996] F.C.J. No. 1460, 121 F.T.R. 39, 35 Imm. L.R. (2d) 281 (Fed. T.D.).
13 *Lin v. Canada (Minister of Citizenship & Immigration)*, 2001 FCT 492, 2001 CarswellNat 957, 15 Imm. L.R. (3d) 48 (Fed. T.D.).
14 *Zhao v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15047 (FC). See http://www.canlii.org/en/ca/fct/doc/2000/2000canlii15047/2000canlii15047.html.

become relative to the circumstances of the case, similar to *Grieser*.[15]

2.4.10. *Zheng v. Canada (Minister of Citizenship & Immigration)*[16]

Zheng was a Chinese Citizen who was working and living in the United States. He intended to establish a restaurant in Canada.

The following is quoted from the judgment:

> [6] In her refusal letter to the applicant the visa officer said, in part:
>
> > I have not awarded you the 30 unit bonus because you were unable to demonstrate that you meet the definition of a Self-Employed Person. According to Canada's *Immigration Regulations,1978*, a Self-Employed immigrant is a "person who intends and has the ability to establish or purchase a business in Canada that will create employment opportunity for himself or herself and will make a significant contribution to the economy or the cultural or artistic life of Canada". At interview, you stated that you intend to work in Canada as a self employed chef and although you indicate experience in this occupation, you were unable to show how you intend to operate a business in Canada successfully. You were unable to explain how you would compete successfully in an already saturated market and how you will compete within than [*sic*] established market. You were unable to explain how this business in Canada would be of a significant economic benefit to Canada given the number of restaurants in the area you intend to establish in Canada is substantial.
> >
> > You claimed at interview that you have more than $32k USD in the United States and a certificate of deposit in your country valued at $68k Cdn. You did not provide sufficient proof to substantiate your claim that you are the sole proprietor of these funds. I note, for example, that by your own account your annual earnings do not exceed more than $30k per year and yet you have more than that in your account in the U.S. Consequently, I was not satisfied you are the sole proprietor of the funds you claim you have and intend to bring with you to Canada to successfully establish your business.
>
> [7] This decision is based on the officer's assessment that the applicant did not demonstrate "ability to purchase or establish a business in Canada that...will make a significant contribution to the economy or the cultural or artistic life of Canada" because:
>
> 1) he was unable to show how he intended to operate a business in Canada successfully competing in market which the officer, admittedly without any detailed knowledge of the market, assumed was "already saturated";
> 2) he was not able to explain how this business would be of significant economic benefit to Canada, given the substantial "number of restaurants in the area you intend to establish" (i.e. 1000 restaurants of all types in Vancouver); the perceptions of the market upon which the officer based these assessments were not disclosed to the applicant, yet they were relied upon as if the applicant could not appreciate them or contest them.
> 3) the officer was not satisfied that Mr. Zheng was "the sole proprietor of the funds you claim you have", because, without raising her concerns about his ability to accumulate savings in the United States, she assumed he could not establish the funds held there in his name were in fact his, particularly the increase in funds from September 1999 to July 2000. Moreover, she ignored other funds claimed to be his which were located in China. This was done without alerting the applicant to her reservations which contradicted the evidence that he presented about his resources.

Comments:

- Providing proof of funds, knowledge of the market, analyses of competition is crucial when claims are made about significant economic benefit.
- What is especially noteworthy is the direct link between business factors and significant economic benefit. Therefore, the business factors (market research, analyses of the specific geographic area) are all closely linked to significant economic benefit

15 *Supra* note 5.
16 *Zheng v. Canada (Minister of Citizenship & Immigration)*, 2003 FCT 54, 2003 CFPI 54, 2003 CarswellNat 111, 2003 CarswellNat 623, [2003] F.C.J. No. 69, 228 F.T.R. 118, 26 Imm. L.R. (3d) 86 (Fed. T.D.).

or contribution as in *Chhibber v. Canada (Minister of Citizenship & Immigration)*.[17]

2.4.11. *Sui v. Canada (Minister of Public Safety & Emergency Preparedness)*[18]

In this IRPA case, a foreign student was removed from Canada. In the subsequent judicial review Justice Gauthier mentioned the following:

> [57] As noted in the Benefits and Costs Analysis included in the draft *Regulations* SOR/DORS/2002-227 published on June 11, 2002, at page 194, foreign students are seen as generating significant economic benefits for Canada since each foreign student spends an average of $20,000 per year on tuition fees and living expenses.

Comments:

- This was one of the first cases in which significant economic benefit was quantified. If a typical student spends CAD $20 000 per annum, it would mean CAD $80 000 over a 4-year qualification.
- The amount a foreign national student will spend in Canada could also be compared against individual annual incomes which averaged about CAD $31,500 per annum in 2009. For a family unit of 2 people or more, the annual income averaged CAD $74,700 in 2009.[19]
- Therefore, if the funds a foreign national will spend is close to a married couple's annual income of CAD $74,700 or the funds to be spent by a foreign student over 4 years of CAD $80,000, it may be argued that the contribution could be classified as a significant economic benefit

2.5. Provincial-Canada Immigration Agreements

IRPR 87 provides for establishment of the Provincial Nominee Class. Pursuant to this section, provinces may enter into agreements with the federal government to nominate certain individuals for permanent residence in this class. Only two provinces refer to the term "significant economic benefit", specifically, British Columbia and Saskatchewan. Other provinces refer to terms such as "economic benefit" which is broader and less specific.

Logically and scientifically, a foreign national that has to make a *significant economic contribution* has a higher bar to meet than a foreign national that must make an *economic contribution*. However, in reality many provinces do not make a direct scientific link between stated objectives and rules of selection of foreign nationals. For example, in the case of Saskatchewan (where the term "significant economic benefit" is used) a foreign national may be nominated without being in Canada and without having a positive Labour Market Opinion (LMO). In terms of the Manitoba agreement (where the term "significant economic benefit" is not used), a skilled worker must be in Canada, which implies that a LMO is needed in most of the cases. Therefore, in the case of Manitoba the bar is set, in the absence of reference to the term "significant economic benefit" in the provincial-federal immigration agreement. Although this is the case, immigration practitioners are advised to look closely at the provincial-federal immigration agreements and refer to the stated objectives in submissions, with specific reference to significant economic benefit where relevant.

2.5.1 *British Columbia–Canada Immigration Agreement*[20]

In Annex B under the heading "3.0 Assessment and Nomination" of the Canada-British Columbia Cooperation Agreement the following is mentioned:

> British Columbia has the sole and non-transferable responsibility to assess and nominate candidates who, based on British Columbia's determination:
>
> - will be of significant benefit to the economic development of British Columbia; and
> - have a strong likelihood of becoming economically established in British Columbia.
>
> British Columbia will nominate foreign nationals on the basis of economic benefit to British Columbia. The nomination criteria of the Provincial Nominee Program categories shall demonstrate the economic benefit to the Province. Provincial

17 *Supra* note 3.

18 *Sui v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2006 FC 1314, 2006 CF 1314, 2006 CarswellNat 3554, 2006 CarswellNat 5026, 302 F.T.R. 144 (Eng.), [2007] 3 F.C.R. 218, 58 Imm. L.R. (3d) 135 (F.C.).

19 Government of Canada, *Average income after tax by economic family types (2006-2010)*, online: Statistics Canada <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/famil21a-eng.htm>; accessed online: 21 May 2012.

20 Government of Canada, Canada-British Columbia Immigration Agreement, online: Citizenship and Immigration Canada <http://www.cic.gc.ca/english/department/laws-policy/agreements/bc/bc-2010-annex-b.asp>; <http://www.cic.gc.ca/english/department/laws-policy/agreements/bc/bc-2010.asp>.

Nominees may be nominated for purposes that include, but are not limited to, meeting critical skill shortages in British Columbia, the immigration of key individuals of businesses that wish to locate in British Columbia and the establishment or enhancement of new and existing businesses.

3.3 Non-economic factors shall not provide the primary basis upon which a nomination is made.

In Appendix D to Annex B (Section D.2), Canada-British Columbia Cooperation Agreement, visa officers are guided by the following:

… a foreign national … is of ***significant benefit*** to British Columbia, a visa officer may issue a temporary work permit to that foreign national pursuant to paragraph 205(a) of the IRPR, if the work permit application includes a letter from British Columbia that: iii. states that the foreign national is being considered for nomination for permanent residence based on their stated intention to either conduct business activity or work as a key staff member of a foreign company or another foreign national establishing an eligible business in the province in British Columbia, as the case may be; iv. states that British Columbia is of the opinion that the planned business activity or work of the foreign national will be of significant benefit to the province.

Comments:

Although the term "significant economic benefit" is not defined in this agreement, meeting skilled shortages and establishment of new business provides some insight into the possible meaning of the term "significant economic benefit".

2.5.2. Saskatchewan – Canada Immigration Agreement[21]

The following is mentioned in the Canada-Saskatchewan Immigration Agreement:

3.1 The objective of the annex is to increase the economic benefits of immigration to Saskatchewan, based on economic priorities and labour market conditions, by providing Saskatchewan with a mechanism to admit Provincial Nominees to Saskatchewan while taking into account the importance of encouraging the development of the francophone community in Saskatchewan.

21 Government of Canada, Canada-Saskatchewan Immigration Agreement, online: Citizenship and Immigration Canada <http://www.cic.gc.ca/english/department/laws-policy/agreements/sask/sask-agree-2005.asp>; signed 7 May 2007; accessed online: 21 May 2012.

4.2 Provincial Nominees may be nominated for purposes determined to be of significant economic benefit to Saskatchewan, including but not limited to, meeting critical skills shortages, facilitating the immigration of key individuals of corporations that wish to locate in Saskatchewan, and meeting the Province's specific economic needs, including regional needs.

4.3 Where the admission of individuals is considered by Saskatchewan to be of significant benefit to its economic development, Saskatchewan may nominate candidates for immigration as Provincial Nominees. In exercising its nomination authority under this annex, Saskatchewan will follow the procedures and criteria for nomination established by Saskatchewan, as amended from time to time. Saskatchewan will keep or cause to be kept written records of its assessments of its nominees against these criteria.

4.9 Canada shall consider a nomination certificate issued by Saskatchewan as initial evidence that admission is of significant benefit to the economic development of Saskatchewan and that the nominee has the ability to become economically established in Canada.

Comments:

In paragraph 4.2 of The Canada-Saskatchewan Immigration Agreement, it is clearly mentioned that meeting critical shortages and supporting the establishment of businesses in Saskatchewan are examples of significant economic benefit. In submissions where economic benefit is argued, market research about labour market shortages would be crucial.

Part Three of this article on "Significant Economic Benefit" in Immigration Law, written by Cobus Kriek and Professor Don De Voretz will resume in the next issue of ImmQuest (Vol. 8, issue 11). Stay tuned!

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Case Tracker: Cases You Should Know!

Mario D. Bellissimo, C.S.

H&C

Case: *Gill v Canada (Minister of Citizenship & Immigration)*
Decider: D.G. Near J.
Court: Federal Court
Citation: 2011 FC 863
Judgment: July 11, 2011
Docket: IMM-5818-10

[32] The Respondent concedes that the Applicant's initial application and submissions were not before the Officer for consideration, but argues that since the Applicant did not suffer prejudice as a result of this breach of procedural fairness, this does not constitute a reviewable error. The Respondent urges the Court to follow the holding in *Yassine v Canada (Minister of Employment and Immigration)* (FCA), 172 NR 308, 27 Imm LR (2d) 135, where, citing the Supreme Court decision in *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC), [1994] 1 SCR 202, the Federal Court of Appeal created an exception to the general rule for cases where "the demerits of the claim are such that it would in any case be hopeless" and "the claim could only be rejected" (paragraphs 9-10). In such circumstances, returning the matter to the decision-maker because of a procedural irregularity would serve no purpose.

[33] The Applicant's case illustrates a significant failing in CIC's record keeping system. The initial submissions contained proof of the Applicant's role as president and shareholder in a restaurant business. By September 2010, however, this information was no longer up-to-date, as at the time the decision was made, the Applicant was no longer an owner of the restaurant. I take note of the Respondent's position that the Applicant's one-time part-ownership of a restaurant was perhaps not material to the decision, but I cannot say with any certainty that the Applicant's original submission would not have affected the outcome of this matter. I follow the reasoning of Justice Anne Mactavish in *Hussain v Canada (Minister of Citizenship and Immigration)*, 2004 FC 259 (CanLII), 2004 FC 259, 40 Imm LR (3d) 177. She wrote at para 25:

> [25] The failure of the Board to consider the submissions of one party, albeit inadvertently, is a beach of procedural fairness. In all of the circumstances, I cannot say with any degree of certainty that the applicants' final submissions would not have had any effect on the outcome of the case.n" [sic] As a consequence, the decision of the Board should be set aside, and the matter remitted to a differently constituted panel for reconsideration on the basis of a complete record.

The Applicant's right to procedural fairness has been breached. Accordingly, I will allow this judicial review.

H&C

Case: *Kinobe v Canada (Minister of Citizenship & Immigration)*
Decider: Francois Lemieux J.
Court: Federal Court
Citation: 2011 FC 845
Judgment: July 8, 2011
Docket: IMM-6403-10, IMM-6404-10

[27] It is not disputed the Officer embarked upon an inquiry to determine the quality of the evidence the applicant and her counsel submitted after the credibility hearing. Based on her search she concluded the Daily Paper did not exist and the e-mails exchanged between Mr. Mack and the applicant's counsel and the information they contained were of little or no value because Mr. Mack had an e-mail address at yahoo.com. The Officer did not disclose to the applicant and her counsel the evidence she had uncovered nor asked them to comment on that evidence.

[28] My reading of her decision is that her findings as a result of her self-initiated inquiry were central to her determination the applicant would not be at risk if returned to Uganda because, in effect, the post hearing evidence was fraudulent. She wrote the following in her decision:

> The onus lies on persons, such as the applicant, who rely on documentary evidence originating in Uganda in support of their claim, to be prepared to demonstrate the authenticity of the documentation presented. The applicant has been unable to demonstrate the authenticity of her documentation and I

have obtained evidence that supports a conclusion that much of the applicant's supporting documents are not authentic and in fact fraudulent. [Emphasis added]

[29] Clearly, the Officer's inquiry was a breach of natural justice. I need only refer to the Federal Court of Appeal's decisions in *Magnasonic Canada Limited v Canada (Anti-Dumping Tribunal)* [1972] FC 1239; *Canadian National Railway v Handyside* (1994) 170 NR 353 for the principle that procedural fairness requires that parties have an opportunity to comment on critical and relevant material.

[30] The Officer may have been right in concluding that the post-hearing material was of no value and may have been fraudulent but that is not the point. The point is that the applicant and her counsel had no opportunity to comment on the evidence which the Officer herself obtained and relied on to render the decision she reached.

H&C

Case: *Wilson v Canada (Minister of Citizenship & Immigration)*
Decider: James W. O'Reilly J.
Court: Federal Court
Citation: 2011 FC 1044
Judgment: July 2, 2011
Docket: IMM-6226-10, IMM-6229-10

[22] However, the officer rejected Ms. Wilson's sworn written narrative about her sexual orientation and the mistreatment she experienced in Jamaica because of it. In *Ferguson*, above, the applicant had not provided a sworn affidavit. By contrast, the officer here, in finding a lack of evidence of Ms. Wilson's sexual orientation and abuse, clearly cloaked an adverse credibility finding with his conclusion in his use of the words "insufficient objective evidence" (as in *Liban v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1252 (CanLII), 2008 FC 1252, and *Sayed v Canada (Minister of Citizenship and Immigration)*, 2010 FC 796 (CanLII), 2010 FC 796).

[23] Accordingly, I find that the officer made an adverse credibility finding against Ms. Wilson. That finding was central to her claim and, had it not been made, Ms. Wilson's application might well have been successful. Accordingly, the officer was obliged to hold an oral hearing.

[25] Having concluded that Ms. Wilson's application was unsupported by credible evidence, the officer did not conduct a serious analysis of state protection. He did not deal with the ability of the state of Jamaica to respond to the particular forms of mistreatment Ms. Wilson described because he did not believe that they had actually occurred, or that there was a risk that they would occur in the future if she returned to Jamaica.

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