Date: 20081218

Docket: IMM-1392-08

Citation: 2008 FC 1396

Montréal, Quebec, December 18, 2008

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

ABOULLA AHMAD AL TURK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of a visa officer at the Canadian Embassy in London, UK, dated February 14, 2008, refusing for insufficient points the applicant's application for permanent residence in a skilled worker category.

I. The facts

[2] A citizen of Jordan, married and the father of one child, the applicant applied at the Canadian High Commission in London (Mission), UK, for a permanent resident visa as a member of the federal skilled worker class, under the occupational category of IT System Manager.

[3] The applicant obtained a bachelor's degree from the Princess Sumaya University College for Technology in Jordan (UJ). According to his own self-assessment on file, his level of English language proficiency was moderate in the abilities of reading, writing, listening, and speaking.

[4] The visa officer proceeded with the initial screening of the applicant's file and noted that the applicant was required to complete the International English Language Testing System (IELTS) test and provide supporting documents for relatives in Canada.

[5] The applicant subsequently informed by letter the Mission that he would be taking the IELTS test in October 2007 and providing an additional updated Family Information Form. This letter was received and recorded in the Computer Assisted Immigration Processing System (CAIPS) by the Mission on August 28, 2007.

[6] Following this letter, the applicant would have sent to the Mission a second letter dated August 21, 2008 wherein he indicated that he was required to change the date of his IELTS test from October 2007 to May 2008. He also provided in this second letter an updated mailing address. The Mission has however no record of this letter ever being received.

[7] In the meantime, the Mission indicated in its file that it had not received any IELTS test results from the applicant as requested.

[8] On February 13, 2008, the file was assessed by the visa officer who determined that he did not have the required total points to warrant the issuing of a permanent resident visa. Consequently, in a letter dated February 14, 2008, the visa officer notified the applicant that his application was denied.

II. The Impugned Decision

[9] Based on the written submissions, the visa officer assessed the applicant with a total of 62 units of a 67 points pass mark with an assessment of two points for English language abilities to ultimately find that the applicant did not have sufficient points to satisfy her that he would be able to become economically established in Canada.

III. Issues

[10] The present case raises three issues:

a. Did the visa officer breach the duty of procedural fairness?
b. Did the visa officer err in her assessment of the applicant's language ability?
c. Did the visa officer err in failing to exercise her discretion pursuant to subsection 76(3) of the Regulations?

IV. Analysis

Standard of Review

[11] This jurisprudence of this Court has recognized that the decision of an immigration officer in the assessment of an application for permanent residence under the skilled worker class involves an exercise of discretion and should therefore be afforded considerable deference. And to the extent that such an assessment is carried out in good faith, in accordance with the principle of natural justice, and without relying on irrelevant or extraneous considerations, the decision is reviewable on the standard of unreasonableness.

Duty of Procedural Fairness

[12] The applicant claims that he was denied procedural fairness because his application was processed in February 2008 before his IELTS exam results from May 2008 were received.

[13] The applicant explains that although he initially made arrangements to sit for his exam in October of 2007, he subsequently changed his plans and rescheduled his exam for May of 2008. He also claimed that he sent the Mission a letter dated August 21, 2007, to notify the Mission of his new appointment for IELTS testing, and that this letter was ignored by the visa officer who went ahead to render her decision on the basis of his written submissions on file without waiting for his rescheduled IELTS test results.

[14] Although the applicant has reproduced the letter of August 21, 2007 which he claims was sent to the Mission, he has filed no corroborating documents to show that this letter was in fact sent

to the Mission either by mail, courier, or fax. There is no transmission fax sheet or mail receipt or any courier documents in the applicant's record, with the exception of his own affidavit which attests that he did send the letter in question and the hearsay evidence contained in his brother's affidavit to the same effect. On the other hand, the visa officer attests in her affidavit after reviewing the entire file that she had been unable to locate therein any such letter and that it was never received by the Mission.

[15] The onus was on the applicant to ensure that the Mission received his letter and there is no indication that he even followed up with the Mission to make sure his letter had in fact been received and most importantly that the Mission was made aware of the fact that he would no longer be available to sit for the IELTS exam in October of 2007. It appears that he simply presumed that his letter had been received and that the Mission was agreeable to rescheduling of his IELTS exam. It would have been wise and prudent and for the applicant to obtain confirmation receipt of his letter of August 21, particularly when the Mission was expecting the result of his IELTS exam for a certain date, and certainly not a notice that the applicant had rescheduled his IELTS test.

[16] The burden was on the applicant to demonstrate that he met all the requirements and selection criteria in order for him to obtain the approval for an immigrant visa. The fact that he failed to exercise due diligence in making sure that the Mission was made aware of the rescheduling of his IELTS exam cannot be blamed on the visa officer, since she could base her decision only on the information before her, as she did not receive the letter in this regard, and there was no way for her to know that there was any problem with the scheduling of the IELTS exam in October of 2007.

[17] Furthermore, it was reasonably opened to the applicant in advance of the final decision of February 13, 2008, to file additional written submissions in support of his professed English language abilities or to request an opportunity to do so in the presence of the visa officer. The applicant has provided no evidence to indicate that he made efforts to file additional documentation to support his English language assessment, and no proof either to back up his claim that the visa officer denied him an opportunity to file further written submissions.

[18] Nevertheless, the information on file submitted by the applicant ensured the visa officer that the applicant would be taking the IELTS test in October 2007, not that it would be delayed until May 2008. The visa officer waited until February 2008 to complete the processing of the application, having noted that the test results were not submitted within the time agreed with the applicant. The applicant had only his visa application to look after and care, while the visa officer presumably processed in the mean time many other visa applications. It appears therefore that the applicant was negligent and is responsible for his own misfortune for not having assured himself that the visa officer had received his letter and was aware that the IELTS test had been rescheduled to May 2008 and that the results would be as a result delayed.

[19] Considering the foregoing, the Court does not see how the visa officer could be accused of having committed a breach of fairness. On the contrary, she had made the applicant aware of her concern a long time before rendering her decision and it was up to the applicant to satisfy this

concern in due time or at least to make sure the officer knew before her decision that he could not meet the target date for the production of his language test results.

Language Assessment

[20] The relevant provisions of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 (the Regulations**)**, read as follows:

79. (1) A skilled worker must specify in their application for a permanent resident visa which of English or French is to be considered their first official language in Canada and which is to be considered their second official language in Canada and must	79. (1) Le travailleur qualifié indique dans sa demande de visa de résident permanent la langue — français ou anglais — qui doit être considérée comme sa première langue officielle au Canada et celle qui doit être considérée comme sa deuxième langue officielle au Canada et :
(a) have their proficiency in those languages assessed by an organization or institution designated under subsection (3); or	a) soit fait évaluer ses compétences dans ces langues par une institution ou organisation désignée aux termes du paragraphe (3);
(b) provide other evidence in writing of their proficiency in those languages.	b) soit fournit une autre preuve écrite de sa compétence dans ces langues.
Points	*Points*
(2) Assessment points for proficiency in the official languages of Canada shall be awarded up to a maximum of 24 points based on the benchmarks referred to in *Canadian Language Benchmarks 2000* for the English language and *Standards linguistiques*	(2) Un maximum de 24 points d'appréciation sont attribués pour la compétence du travailleur qualifié dans les langues officielles du Canada d'après les standards prévus dans les *Standards linguistiques canadiens 2002*, pour le français, et dans le *Canadian Language Benchmarks 2000*,

Canadiens 2002 for the French language, as follows:

[…]

(*b*) for the ability to speak, listen, read or write with moderate proficiency

(i) in the first official language, 2 points for each of those abilities if the skilled worker's proficiency corresponds to a benchmark of 6 or 7, and

(ii) in the second official language, 2 points for each of those abilities if the skilled worker's proficiency corresponds to a benchmark of 6 or 7; and

(*c*) for the ability to speak, listen, read or write

(i) with basic proficiency in either official language, 1 point for each of those abilities, up to a maximum of 2 points, if the skilled worker's proficiency corresponds to a benchmark of 4 or 5, and

(ii) with no proficiency in either official language, 0 points if the skilled worker's proficiency corresponds to a benchmark of 3 or lower.

pour l'anglais, et selon la grille suivante :

[…]

b) pour les capacités à parler, à écouter, à lire ou à écrire à un niveau de compétence moyen :

(i) dans la première langue officielle, 2 points pour chaque aptitude si les compétences du travailleur qualifié correspondent aux niveaux 6 ou 7,

(ii) dans la seconde langue officielle, 2 points si les compétences du travailleur qualifié correspondent aux niveaux 6 ou 7;

c) pour l'aptitude à parler, à écouter, à lire ou à écrire chacune des langues officielles :

(i) à un niveau de compétence de base faible, 1 point par aptitude, à concurrence de 2 points, si les compétences du travailleur qualifié correspondent aux niveaux 4 ou 5,

(ii) à un niveau de compétence de base nul, 0 point si les compétences du travailleur qualifié correspondent à un niveau 3 ou à un niveau inférieur.

[21] The applicant takes the position that it is absurd for the visa officer to conclude that he only possesses a basic level of English language ability considering that he studied at UJ for 4 years and received all of his course instruction in the English language. But this does not conclusively establish that the applicant had either a moderate or high level of abilities in the English language. He might very well have been able to pass all of his course work with only a basic level of English language abilities.

[22] In addition, it is clear from the visa officer's affidavit that he did take the applicant's experience at UJ into account but found it to be insufficient for the purposes of demonstrating a moderate to high level of English language abilities. The officer noted that although the applicant may have studied in English, she was still not satisfied that he had studied in an English-speaking environment such as a person having studied in the UK or the USA. And this was quite reasonable for the visa officer to arrive at such a conclusion.

[23] In brief, the visa officer based her assessment of the applicant's English language proficiency on his written submission as well as the information on file, but did not retain self-serving or unverifiable evidence provided by the applicant and required him to complete the IELTS test that he agreed to pass, and the visa officer was not informed before her decision that those tests had been rescheduled and that the results would be delayed.

[24] The Court recognizes that subsection 79(2) of the Regulations states that the assessment of points for proficiency of the official languages is to be awarded based on the Canadian Language

Benchmarks (CLB). The CAIPS notes state only that the visa officer is “not satisfied that the applicant has demonstrated English language ability at benchmark 8”. True, this conclusion contains no reference to the applicant’s writing sample, which was part of his submissions. But the writing samples provided by the applicant do not prove as such that he wrote these samples and that they could not have been written instead by somebody else.

[25] Reading however the refusal letter in conjunction with the CAIPS notes and the officer’s unchallenged affidavit, it becomes clear that the officer’s assessment of the applicant’s English language abilities was made having regard to the written submissions in the file of the applicant, his educational experience and the CLB.

[26] Considering all the circumstances of the case in issue, including the applicant’s failure to produce his IELTS test results on time and to make sure that the officer had been made aware of the rescheduling of the IELTS test, the Court cannot see that the visa officer’s failure to assess the applicant’s writing sample in accordance with the CLB can be sufficiently important in itself as to render the officer’s discretionary decision unreasonable.

[27] In brief and for all these reasons, the Court finds that the impugned decision falls within a range of possible and acceptable outcomes which are defensible in respect of the facts and the law, the assessment therein contained appears to have been carried out in good faith, in accordance with the principle of natural justice, and without relying on irrelevant or extraneous considerations. It therefore deserves the deference of the Court. As a consequence, this Court concludes that the visa

officer did not commit a reviewable error and that her decision as a whole is reasonable. Therefore, the judicial review application will be dismissed.

[28] The Court agrees with the parties that there is no serious question of general importance to certify.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application is dismissed.

"Maurice E. Lagacé"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1392-08
STYLE OF CAUSE:	ABOULLA AHMAD AL TURK v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 19, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	LAGACÉ D.J.
DATED:	DECEMBER 18, 2008

APPEARANCES:

Mary Lam	FOR THE APPLICANT
Alison Engel-Yan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Cecil L. Rotenberg, Q.C. Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT