Federal Court  Cour fédérale

Date: 20101020

Docket: IMM-6394-09

Citation: 2010 FC 1025

Ottawa, Ontario, October 20, 2010

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

JIGARKUMAR PATEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Jigarkumar Patel, seeks an order quashing a decision of a visa officer, rendered on January 5, 2010, by which his application for permanent residence under the skilled worker class was refused.

I. Background

[2] Mr. Patel is a citizen of India. He is 31 years old and married. He and his wife hold Bachelor of Science degrees from Sardar Patel University in India.

[3] Mr. Patel came to Canada in 2004 under a study permit. Beginning in February 2005 he attended as a full-time student at the Canadian Career College where he was awarded a Diploma in International Management in June 2006. From May 2007 to December 2007 Mr. Patel attended the Xincon Technology College of Canada (Xincon College) in Scarborough as a full-time student studying Computer Systems Technology. The record establishes that he obtained several course credits from Xincon College over two semesters of study but he did not complete the program of 118 weeks.

[4] Mr. Patel submitted his application for permanent residency in January 2008. In that application he claimed an entitlement to 74 selection points. This included nine points for adaptability made up of five points for his two years of Canadian study and four points for his wife's post-secondary education in India.

[5] In August 2008, Mr. Patel's request to extend his study permit was refused and, as required, he and his wife returned to India.

[6] On October 16, 2009 Mr. Patel's application for a permanent resident visa was refused based on the visa officer's award of only 63 selection points. This fell four points below the

minimum required for eligibility for a visa. The shortfall was based on the visa officer's refusal to award any selection points for Mr. Patel's Canadian post-secondary studies. The decision provided the following rationale for that part of the visa officer's assessment:

> No adaptability points for your prior study in Canada have been assessed as you have not studied at a post-secondary institution in Canada in a program of full-time study of at least two years duration; you completed a one year program at Canada Career College and have presented evidence you attended one semester at Xincon College.

[7] The visa officer's CAIPS notes provided additional detail in support of the decision:

> To have 5 points assessed, PA must provide evidence he has studied at a (i.e. one) post-secondary Cdn institution in a program of full-time study of at least two yrs' duration; PA has completed a one yr program at one school and appears to have attended one semester at a different school:: furthermore, I note PA took two disparate, distinct programs and did not/not transfer from one institution to another into a similar program and with transfer credits:: PA has presented transcripts he had notarized in Jan/09 and I understand this to mean these transcripts show the extent of his studies at Xincon College as it would seem unreasonable to have notarized, and then submit, transcripts that do not show the complete scholastic history at a particular school:
>
> I am not/not satisfied, based on the evidence before me, to assess 5 points (for the purposes of this app'l only).

II. Issues

[8] What is the appropriate standard of review?

[9] Did the visa officer err in his interpretation of s 83 of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) (IRPA Regulations)?

III. Analysis

[10] I do not agree with the Minister's assertion that the principal issue presented by this application must be assessed on the standard of reasonableness. The primary basis for the visa officer's decision involved the interpretation of s 83 of the IRPA Regulations. This raises an issue of law which must be reviewed on the standard of correctness: see *Sapru v Canada*, 2010 FC 240, 2010 CarswellNat 455 (WL) at paras 15 and 16; *Charalampis v Canada*, 2009 FC 1002, 353 FTR 24 at para 34; and *Angeles v Canada*, 2009 FC 744, 2009 CarswellNat 2506 (WL) at para 16. I accept that the issue of whether Mr. Patel completed two years of study as required by s 83 involves an issue of mixed fact and law attracting a standard of review of reasonableness.

[11] The visa officer refused to award any points for Mr. Patel's adaptability based, in part, upon an interpretation of s 83 of the IRPA Regulations that required Mr. Patel's full-time attendance for two years in a single academic program at a single accredited institution. Because Mr. Patel had attended two distinct academic programs at two accredited institutions, the visa officer found that the requirements of s 83 had not been met. The visa officer also appears to have found that Mr. Patel had attended school for only 18 months which was also insufficient to satisfy the s 83 study requirement.

[12] The relevant portions of s 83 provide:

Adaptability (10 points)	Capacité d'adaptation (10 points)
83. (1) A maximum of 10	83. (1) Un maximum de 10

points for adaptability shall be awarded to a skilled worker on the basis of any combination of the following elements:

points d’appréciation sont attribués au travailleur qualifié au titre de la capacité d’adaptation pour toute combinaison des éléments ci-après, selon le nombre indiqué :

[…]

[…]

(*b*) for any previous period of study in Canada by the skilled worker or the skilled worker's spouse or common-law partner, 5 points;

b) pour des études antérieures faites par le travailleur qualifié ou son époux ou conjoint de fait au Canada, 5 points;

[…]

[…]

Previous study in Canada

(3) For the purposes of paragraph (1)(*b*), a skilled worker shall be awarded 5 points if the skilled worker or their accompanying spouse or accompanying common-law partner, by the age of 17 or older, completed a program of full-time study of at least two years' duration at a post-secondary institution in Canada under a study permit, whether or not they obtained an educational credential for completing that program.

Études antérieures au Canada

(3) Pour l’application de l’alinéa (1)*b*), le travailleur qualifié obtient 5 points si, à la date de son dix-septième anniversaire ou par la suite, lui ou, dans le cas où il l’accompagne, son époux ou conjoint de fait a complété avec succès un programme au titre d’un permis d’études — que ce programme ait été couronné ou non par un diplôme — qui a nécessité au moins deux ans d’études à temps plein dans un établissement d’enseignement postsecondaire au Canada.

[13] The parties disagree about the meaning of the words “completed a program of full-time study of at least two years duration… whether or not they have obtained an educational credential for completing that program”.

[14] It is argued on behalf of Mr. Patel that this provision means only that the person be enrolled as a full-time student (15 hours per week) in one or more accredited academic programs for a period of not less than two academic years (4 semesters).

[15] In keeping with the visa officer’s decision, the Minister contends that s 83 is more restrictive and that it does not permit a person to pursue a succession of different academic programs taken at more than one accredited institution.

[16] It is of considerable surprise to me that this specific issue has not previously arisen and that I have no evidence to indicate whether the visa officer’s interpretation of s 83 is in keeping with the Respondent’s past practice. The only authority cited to me is that of Justice Elizabeth Heneghan in *Nie v Canada (Minister of Citizenship and Immigration)*, 2009 FC 220, 80 Imm. LR (3d) 127 which involved a student who had attended three different schools under 3 study permits. The visa officer’s decision stated only that Mr. Nie had not established that he had studied in Canada for at least two years. Apparently the interpretation argument now advanced to me by the Minister was not put to Justice Heneghan because it did not form any part of her analysis. She overturned the visa officer’s decision but only because it was inconsistent with the clear evidence of a period of a study exceeding two years.

[17] Given the multitude of post-secondary programs in Canada that are less than two years in duration, I would have thought that the restrictive approach taken before me by the Minister would have led to a much clearer statement than is found in the Federal Skilled Worker Manual (OP6) which states:

> b) Previous study in Canada:
>
> - Award five points if the applicant or accompanying spouse or common-law partner completed a program of full-time study of at least two years' duration at a post-secondary institution in Canada, if this occurred after the age of seventeen and with valid study permits.
>
> (The person is not required to have obtained an educational credential for these two years of study in Canada to earn the points, but simply to have completed at least two years of study.)
>
> [Emphasis added]

[18] Regardless of the above concerns, I am satisfied that the visa officer's interpretation of s 83 was incorrect in law.

[19] The Minister argues that s 83 refers throughout to the singular (a program; a post-secondary institution; that program) and that its ordinary meaning must therefore be confined to a single two-year academic program at one institution.

[20] Counsel for Mr. Patel points to ss 33(2) of the *Interpretation Act*, R.S., 1985, c. I-21 which dictates that "words in the singular include the plural and words in the plural include the singular". Accordingly, the references in s 83 to the singular must be taken to include "programs",

"institutions", "study permits" and "those programs": see *Canada v Ward*, [1993] 2 SCR 689, 103 DLR (4th) 1 at para 90. It seems to me that this argument has considerable merit and is also in keeping with a purposive approach to the interpretation of s 83.

[21] Consistent with the statutory language used, both parties agree that the acquisition of an academic credential is not a requirement for the award of adaptability points. This is in harmony with s 78 of the Regulations where points are awarded for academic credentials. Presumably one's adaptability is not dependent upon academic achievement but rather on the basis that one be enrolled in full-time studies at an accredited institution, or institutions for at least two years. I can identify no policy rationale for the narrow approach advanced by the Minister. Taking a succession of academic programs at one or more accredited institutions would not defeat or detract from the statutory purpose of recognizing a person's adaptability, provided that the other statutory pre-requisites are met. To entirely discount the value of Mr. Patel's pursuit of business and computer skills on such a basis seems perverse and not in keeping with the statutory object of recognizing a person's adaptability in Canada.

[22] The second basis for the visa officer's decision appears to be that Mr. Patel did not complete two years of academic study. The record indicates that Mr. Patel had successfully completed three academic semesters of full-time study at the Canadian Career College and either one or two semesters at Xincon College. I agree with counsel for Mr. Patel that reference to two years in s 83 means academic and not calendar years (see ss 78(1)) and that it contemplates breaks in the continuity of study. If a student removes himself unduly from a study program, that problem can be

addressed by the revocation of the study permit. In the result, Mr. Patel's apparent successful completion of either four or five academic semesters would be sufficient to fulfill the two year study requirement under s 83.

[23] The visa officer's decision is set aside. The matter will be remitted to a different decision-maker for re-determination on the merits in accordance with these reasons.

[24] The parties agreed that the issue raised on this application may be of sufficient importance to support a certified question. I will, therefore, allow counsel for the Respondent 14 days to propose an appropriate question and the Applicant will have 7 days thereafter to respond.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is allowed with the matter to be remitted to a different decision-maker for re-determination on the merits and in accordance with these reasons.

THIS COURT FURTHER ADJUDGES that the issue of a certified question is reserved pending further submissions from the parties, if any.

" R. L. Barnes "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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