

Federal Court



Cour fédérale

Date: 20101130

Docket: IMM-6455-09

Citation: 2010 FC 1206

Ottawa, Ontario, November 30, 2010

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

SYED IMAM HASAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The present Application concerns the correct interpretation of the regulations that a visa officer is required to apply in determining the “education” component of a person’s application to become a permanent resident of Canada as a “Federal Skilled Worker”. Most recently, two decisions of the Court on this issue have been placed before the Federal Court of Appeal on the same certified question and which, it is agreed by Counsel in the present Application, express a majority of opinion in previously decided cases. However, upon hearing the present Application, and considering the regulations in question in their full context, I am strongly of the opinion that the

existing majority view in the jurisprudence is not a precedent for determining the present Application.

[2] With respect to the cardinal principle of comity that substantially similar decisions rendered by Judges of the Court should be followed in the interest of advancing certainty in the law, I find an exception in the present circumstances. In my opinion, the two decisions on which certified questions have been posed, and which are representative of many others with respect to the interpretation of the education component of the Federal Skilled Worker category, fail to consider the correct application of a particular provision of the *Regulations* which, in the circumstances presently under consideration, would have, in my opinion, produced a different result (see: *Almrei v. Canada (Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness)*, 2007 FC 1025 at paras. 61 – 62).

[3] To settle the interpretation question, I believe that the Federal Court of Appeal should have the benefit of this, a different perspective, on the certified questions already placed before it.

I. Introduction

[4] The *Immigration and Refugee Protection Act (IRPA)* and the *Immigration and Refugee Protection Regulations (SOR/2002-227) (Regulations)* provide the possibility of permanent residency in Canada to a category of applicants known as the Federal Skilled Worker Class (*IRPA*: s. 12(2)). The Federal Skilled Worker category is “prescribed as a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become

economically established in Canada and who intend to reside in a province other than the Province of Quebec” (*Regulations*: s. 75 and s. 76).

[5] In April 2009, the Applicant, Syed Imam Hasan, a citizen of Bangladesh, submitted an application for permanent residency in Canada as a Federal Skilled Worker. Federal Skilled Worker applicants are required to obtain or exceed a total of 67 points allocated in the categories of age, education, official language proficiency, experience, arranged employment, and adaptability. In October 2009, Mr. Hasan’s application was rejected by a Visa Officer at the Canadian High Commission in Singapore who awarded him only a total of 64 points, three points short of the 67 point threshold.

[6] In the present Application, Mr. Hasan challenges the Visa Officer’s decision, the principal focus being on the points awarded in the education category; Mr. Hasan was awarded only 22 out of a possible 25 points. Mr. Hasan possesses three university degrees, being a Bachelor of Commerce degree awarded in April 1993, a Master of Commerce in Management degree awarded in August 1998, and an Executive Master of Business Administration in Marketing degree awarded in December 2008, and argues that, based on his last degree and the fact that he has completed in excess of 18 years of full-time education studies, he is entitled to be awarded the full 25 points.

[7] The success of Mr. Hasan’s argument is based on the correct interpretation of the *Regulations* which apply to the education category. For the purposes of the present Application, the critical elements of the *Regulations* are s. 73 and s. 78 which are quoted in the “Addendum” to these reasons.

II. The Visa Officer's Decision

[8] In the decision rendered, the Visa Officer made the following finding:

You obtained 22 points for education based on the evidence that your highest credential is a Master's degree with the equivalent of 16 years of full-time education leading up to the completion of your highest degree (your 2 Masters [sic] degrees separately), in a recognized post-secondary institution. Note that you cannot cumulate more years of education by having 2 credentials at the same level.

[Emphasis added]

(Application Record, p. 6)

[9] This finding is elaborated upon in the Visa Officer's affidavit, dated February 11, 2010, filed unopposed in the present Application:

I considered the applicant's education history and concluded that none of his two Masters [sic] Degrees (commerce and business administration) was in the line of progression towards the other. I therefore awarded the maximum points for the years of study leading up to his highest university credential (any of his two Masters [sic] Degrees taken separately) which is 16 years of full time education and I awarded 22 points for education.

In addition, in the affidavit the Visa Officer quotes from computer generated notes to substantiate the conclusion that either of Mr. Hasan's two Master's degrees take 16 years of study to complete:

Information found on UNESCO's website confirms that under the Bangladesh educational system, a Master's degree level studies amounts to the equivalent of 16 years of full education.

(Affidavit, p. 1 and p. 3)

[10] With respect to Mr. Hasan's "highest university credential", Counsel for Mr. Hasan agrees that each of his two Master's degrees are equivalent in the sense that each takes two years to complete and that the commerce degree is not a requisite to the business administration degree.

However, what is contested is the Visa Officer's choice of awarding points with respect to the commerce degree rather than the business administration degree. It is this choice that is the subject matter of the statutory interpretation question at the heart of the present Application.

III. Statutory Interpretation

[11] The statutory interpretation question is whether the factors of attaining a Master's or Doctoral degree and completing the requisite full time studies stated in s. 78(2)(f) of the *Regulations* should be read conjunctively or disjunctively. The Visa Officer decided on the former interpretation. With the exception of Justice Mandamin's decision in *McLachlan v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 975, this conclusion conforms with the opinion expressed in previously decided cases of the Court, the most recent of which are Justice Heneghan's decisions in *Khan v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 983, and *Kabir v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 995. Because these decisions concern applicants who offered two Master's degrees as credentials, they are central to the analysis which follows.

[12] The interpretation of the *Regulations* adopted in *Khan* and *Kabir*, and applied by the Visa Officer in the present case, is based on emphasis placed on the words of s. 78(3)(a) that education points "shall not be awarded cumulatively on the basis of more than one single educational credential". As the reasoning goes behind not awarding "double points" because an applicant has two Master's degrees, if it takes only 16 years to attain a first Master's degree and this degree is not a prerequisite to a further Master's degree attained, points are to be awarded on the basis of only the

first Master's degree with no consideration being given to the second Master's degree. Justice Heneghan's finding in *Khan* at paragraph 14 emphasizes the point:

The language of subsection 78(3) is clear. No points can be awarded for two Master's degrees. The Applicant completed 19 years of full-time studies but only 16 years were required in Bangladesh in order to obtain a Master's degree. He falls within the scope of paragraph 78(2)(e). No reviewable error was committed by the Officer. This case is parallel to the decision in *Bhuiya v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 878.

In *Kabir* at paragraph 14, Justice Heneghan makes a similar statement. The Visa Officer in the decision presently under review came to the same conclusion by awarding only 22 points and not the full 25 points pursuant to s. 78(2)(f). Counsel for the Respondent explains that, as a matter of practice, the 22 points awarded to Mr. Hasan is based on the application of the "OP6 – Federal Skilled Workers Manual" which visa officers consult: if under s. 78(2)(f) a person has a Master's degree but only the imputed 16 years of education to obtain it, points are awarded according to the next highest category being s. 78(2)(e) (Respondent's Further Memorandum of Argument, paras. 12 and 13).

[13] Since Justice Heneghan specifically relies on Justice Mactavish's decision in *Bhuiya*, I find a comment is necessary about the evidence of legislative intention relied upon to reach the conclusion in that case.

[14] The education component of Ms. Bhuiya's application for permanent residence as a Skilled Worker was a Master's degree in Commerce which took 16 years to attain and a diploma in personnel management which took a year to attain. Justice Mactavish applied s. 78(3)(b)(i) to conclude that the credential that results in the highest number of points is the Master's degree which

took 16 years to complete and points were awarded accordingly. Because he has two Master's degrees, the factual matrix of Mr. Hasan's application presently under consideration is more complex from that presented by Ms. Bhuiya, and, as a result, the factual finding in her case is not a precedent to guide the outcome of his case. However, the decision is cited as precedent for its conclusion on legislative intention.

[15] In *Bhuiya*, Justice Mactavish refers to the Regulatory Impact Assessment Statement (RIAS) relating to the *Regulations* and makes this finding at paragraphs 17 to 19:

In this case, a review of the RIAS discloses that the reason for requiring that a candidate have both a particular degree *and* a specified number of years of education was to promote consistent standards in the assessment of a candidate's education and training, given the range of education and formal training systems around the world.

The RIAS uses a Master's degree as an example, noting that to qualify for the maximum number of points for a Master's the candidate must also have 17 years of education. In other words, the years of education requirement is clearly intended to establish minimum standards for each type of degree.

The fact that Ms. Bhuiya may have spent one additional year in school after obtaining her Master's degree does not turn her 16 year Master's degree into a 17 year Master's degree.

[Emphasis added]

[16] The RIAS that Justice Mactavish is referring to is quoted by Justice Russell in *Healey v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 355 at paragraph 35 as follows:

...Another change to the Education factor is the manner in which points will be allocated for each credential level. The applicant is allocated points for education on the basis of having both a credential (such as a diploma, degree, or apprenticeship certificate)

and a minimum number of years of education and formal training. For example, for a Master's degree, an applicant must also have completed a total of at least 17 years of full-time or full-time equivalent studies. Given the range of educational and formal training systems around the world, this mechanism will serve to promote consistent standards in the assessment of education and training while still placing emphasis on the essentials - a credential as well as relevant minimum levels of education and formal training.

[Emphasis added]

[17] With respect, it is not at all clear that the comment in the RIAS with respect to completing 17 years of full-time studies refers just to the Master's degree or generally to the applicant's complete study history. There is no clear statement in the *IRPA* or the *Regulations*, or in the RIAS for that matter, that when two Master's degrees are presented as credentials by an applicant, the complete study history of the applicant cannot be considered. This point is made by Justice Mandamin in *McLachlan* at paragraph 30: "in my view the whole of section 78 of the *IRPA Regulations* is directed at assessment of educational accomplishment".

[18] In my opinion, the lack of clarity in the *Regulations* has caused visa officers to adopt a self-help approach. The importation of the non-legislative notion of "line of progression" seems to be an attempt to bring clarity to the unclear. It might bring clarity and certainty to the decision-making of visa officers under the *Regulations*, but that is not the point. The question is whether it is lawful to do so.

[19] Counsel for Mr. Hasan argues that the decisions in *Khan* and *Kabir* neglect to address the operation of s. 78(3)(b)(i) which states that points are to be awarded, including under s. 78(2)(f), "on the basis of the single educational credential that results in the highest number of points". As the

argument goes, in order for this legislative intention to operate to provide a benefit to an applicant with two Master's degrees, the factors named in s. 78(2)(f) must be read disjunctively. That is, if an applicant such as Mr. Hasan has two Master's degrees and a total of 17 years or more of full-time studies in his or her complete academic history, the last of the degrees must be assessed together with the applicant's complete academic history. In my opinion, this is the correct approach.

[20] It is important to note that in both *Khan* and *Kabir*, the quotation of the *Regulations* provided includes a citation of s. s. 78(3)(b)(i), but no critical analysis is provided regarding the impact of the provision on the circumstances under consideration. Accordingly, I find that *Khan* and *Kabir* are not precedents to apply in the present case.

IV. **Result**

[21] I agree with Counsel for the Applicant that the failure to consider the correct application of s. 78(3)(b)(i) of the *Regulations* by the Visa Officer in the present case constitutes an error of law which warrants setting the decision aside and the certifying of a question for consideration by the Federal Court of Appeal.

ORDER

THIS COURT ORDERS that the decision under review is set aside and the matter is referred back for re-determination by a different visa officer.

By the consent of Counsel for Mr. Hasan and the Respondent, because it is of general importance and determinative of the present Application, I certify the same question for consideration by the Federal Court of Appeal as that certified in *Khan* and *Kabir*:

In assessing points for education under s. 78 of the Immigration and Refugee Protection Regulations, does the visa officer award points for years of full-time equivalent studies that did not contribute to obtaining the educational credential being assessed?

“Douglas R. Campbell”

Judge

ADDENDUM

Sections 73 and 78 of the *Regulations* set out the procedure by which points are to be awarded in the education category.

“Educational credential” is defined in s. 73 of the *Regulations* as follows:

“educational credential”	« diplôme »
« diplôme »	“educational credential”
“educational credential” means any diploma, degree or trade or apprenticeship credential issued on the completion of a program of study or training at an educational or training institution recognized by the authorities responsible for registering, accrediting, supervising and regulating such institutions in the country of issue.	« diplôme » Tout diplôme, certificat de compétence ou certificat d’apprentissage obtenu conséquemment à la réussite d’un programme d’études ou d’un cours de formation offert par un établissement d’enseignement ou de formation reconnu par les autorités chargées d’enregistrer, d’accréditer, de superviser et de réglementer les établissements d’enseignement dans le pays de délivrance de ce diplôme ou certificat.

Section 78 of the *Regulations* reads as follows:

Selection Grid	Grille de sélection
<u>Definitions</u> 78. (1) The definitions in this subsection apply in this section. <u>“full-time”</u> <u>« temps plein »</u>	<u>Définitions</u> 78. (1) Les définitions qui suivent s’appliquent au présent article. <u>« équivalent temps plein »</u> <u>“full-time equivalent”</u>
“full-time” means, in relation to a program of study leading to an educational credential, at least 15 hours of instruction per	« équivalent temps plein » Par rapport à tel nombre d’années d’études à temps plein, le nombre

week during the academic year, including any period of training in the workplace that forms part of the course of instruction.

“full-time equivalent”

« équivalent temps plein »

“full-time equivalent” means, in respect of part-time or accelerated studies, the period that would have been required to complete those studies on a full-time basis.

Education (25 points)

(2) A maximum of 25 points shall be awarded for a skilled worker’s education as follows:

(a) 5 points for a secondary school educational credential;

(b) 12 points for a one-year post-secondary educational credential, other than a university educational credential, and a total of at least 12 years of completed full-time or full-time equivalent studies;

(c) 15 points for

(i) a one-year post-secondary educational credential, other than a university educational credential, and a total of at least 13 years of completed full-time or full-time equivalent studies, or

(ii) a one-year university educational credential at the bachelor’s level and a total of at

d’années d’études à temps partiel ou d’études accélérées qui auraient été nécessaires pour compléter des études équivalentes.

« temps plein »

“full-time”

« temps plein » À l’égard d’un programme d’études qui conduit à l’obtention d’un diplôme, correspond à quinze heures de cours par semaine pendant l’année scolaire, et comprend toute période de formation donnée en milieu de travail et faisant partie du programme.

Études (25 points)

(2) Un maximum de 25 points d’appréciation sont attribués pour les études du travailleur qualifié selon la grille suivante :

a) 5 points, s’il a obtenu un diplôme d’études

secondaires;

b) 12 points, s’il a obtenu un diplôme postsecondaire — autre qu’un diplôme universitaire — nécessitant une année d’études et a accumulé un total d’au moins douze années d’études à temps plein complètes ou l’équivalent temps plein;

c) 15 points, si, selon le cas :

(i) il a obtenu un diplôme postsecondaire — autre qu’un diplôme universitaire — nécessitant une année d’études et a accumulé un total de treize années d’études à temps plein complètes ou l’équivalent temps plein,

(ii) il a obtenu un diplôme universitaire de premier cycle

least 13 years of completed full-time or full-time equivalent studies;

(d) 20 points for

(i) a two-year post-secondary educational credential, other than a university educational credential, and a total of at least 14 years of completed full-time or full-time equivalent studies, or

(ii) a two-year university educational credential at the bachelor's level and a total of at least 14 years of completed full-time or full-time equivalent studies;

(e) 22 points for

(i) a three-year post-secondary educational credential, other than a university educational credential, and a total of at least 15 years of completed full-time or full-time equivalent studies, or

(ii) two or more university educational credentials at the bachelor's level and a total of at least 15 years of completed full-time or full-time equivalent studies; and

(f) 25 points for a university educational credential at the master's or doctoral level and a total of at least 17 years of completed full-time or full-time equivalent studies.

nécessitant une année d'études et a accumulé un total d'au moins treize années d'études à temps plein complètes ou l'équivalent temps plein;

d) 20 points, si, selon le cas :

(i) il a obtenu un diplôme postsecondaire — autre qu'un diplôme universitaire — nécessitant deux années d'études et a accumulé un total de quatorze années d'études à temps plein complètes ou l'équivalent temps plein,

(ii) il a obtenu un diplôme universitaire de premier cycle nécessitant deux années d'études et a accumulé un total d'au moins quatorze années d'études à temps plein complètes ou l'équivalent temps plein;

e) 22 points, si, selon le cas :

(i) il a obtenu un diplôme postsecondaire — autre qu'un diplôme universitaire — nécessitant trois années d'études et a accumulé un total de quinze années d'études à temps plein complètes ou l'équivalent temps plein,

(ii) il a obtenu au moins deux diplômes universitaires de premier cycle et a accumulé un total d'au moins quinze années d'études à temps plein complètes ou l'équivalent temps plein;

f) 25 points, s'il a obtenu un diplôme universitaire de deuxième ou de troisième cycle et a accumulé un total d'au moins dix-sept années

Multiple educational achievements

(3) For the purposes of subsection (2), points

(a) shall not be awarded cumulatively on the basis of more than one single educational credential; and

(b) shall be awarded

(i) for the purposes of paragraphs (2)(a) to (d), subparagraph (2)(e)(i) and paragraph (2)(f), on the basis of the single educational credential that results in the highest number of points, and

(ii) for the purposes of subparagraph (2)(e)(ii), on the basis of the combined educational credentials referred to in that paragraph.

Special circumstances

(4) For the purposes of subsection (2), if a skilled worker has an educational credential referred to in paragraph (2)(b), subparagraph (2)(c)(i) or (ii), (d)(i) or (ii) or (e)(i) or (ii) or paragraph (2)(f), but not the total number of years of full-time or full-time equivalent studies required by that paragraph or subparagraph, the skilled worker shall be awarded the same number of points as the number of years of completed full-time or full-time

d'études à temps plein complètes ou l'équivalent temps plein.

Résultats

(3) Pour l'application du paragraphe (2), les points sont accumulés de la façon suivante :

a) ils ne peuvent être additionnés les uns aux autres du fait que le travailleur qualifié possède plus d'un diplôme;

b) ils sont attribués :

(i) pour l'application des alinéas (2)a) à d), du sous-alinéa (2)e)(i) et de l'alinéa (2)f), en fonction du diplôme qui procure le plus de points selon la grille,

(ii) pour l'application du sous-alinéa (2)e)(ii), en fonction de l'ensemble des diplômes visés à ce sous-alinéa.

Circonstances spéciales

(4) Pour l'application du paragraphe (2), si le travailleur qualifié est titulaire d'un diplôme visé à l'un des alinéas (2)b), des sous-alinéas (2)c)(i) et (ii), (2)d)(i) et (ii) et (2)e)(i) et (ii) ou à l'alinéa (2)f) mais n'a pas accumulé le nombre d'années d'études à temps plein ou l'équivalent temps plein prévu à l'un de ces

equivalent studies set out in the paragraph or subparagraph.

alinéas ou sous-alinéas, il obtient le nombre de points correspondant au nombre d'années d'études à temps plein complètes — ou leur équivalent temps plein — mentionné dans ces dispositions.

[Emphasis added]

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6455-09

STYLE OF CAUSE: SYED IMAM HASAN v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 19, 2010

REASONS FOR : CAMPBELL J.

DATED: NOVEMBER 30, 2010

APPEARANCES:

Mr. Ian R. J. Wong FOR THE APPLICANT

Ms. Nicole Rahaman FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gardner Wong LLP FOR THE APPLICANT
Barrister & Solicitor
Toronto, Ontario

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario