

Federal Court



Cour fédérale

Date: 20110811

Docket: IMM-146-11

Citation: 2011 FC 985

Toronto, Ontario, August 11, 2011

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

AHMAD YASEEN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Ahmad Yaseen applies for judicial review of the decision of Designated Immigration Officer Carole Smith-Mekkaoui (the Officer) refusing his application for permanent residence on the basis that he did not meet the requirements for immigration into Canada.

[2] Mr. Ahmad Yaseen received no points for official language proficiency, as he had not provided results of his International English Language Testing System (IELTS) examination within

the provided deadline as requested. Without the results, the Officer saw no basis upon which to assess the Applicant's English language proficiency, and therefore refused the request.

[3] Mr. Ahmad Yaseen explains that the earliest available test date was after the deadline, and that his representative had informed the Officer that these results would be submitted as soon as possible. He submits the Officer denied him procedural fairness by refusing the application without waiting for the results, instead of granting an extension of time. Mr. Ahmad Yaseen also submits that the Officer erred by ignoring other evidence of his language ability.

[4] I conclude that, while the Officer did not err in not granting an extension of time, the Officer erred in ignoring other evidence of Mr. Ahmad Yaseen's language ability. Accordingly I grant the application for judicial review for the reasons that follow.

Background

[5] The Applicant, Mr. Ahmad Yaseen, is a citizen of Jordan who resides in the United Arab Emirates. He applied for permanent residence under the Skilled Worker category in October 2006. His wife and daughter were included on the application as dependents.

[6] The Applicant's representative forwarded documents on February 11, 2009, and included a note: "The client registered for the IELTS exam and the result as per the requirement will be furnished as soon as available."

[7] On March 10, 2009, the Officer informed that Applicant that he had 60 days to provide further documentation in support of the application, including the language test results for English proficiency. According to the Applicant's affidavit, he was unable to schedule an IELTS exam until after the deadline.

Decision Under Review

[8] The Officer informed the Applicant on June 29, 2009 that he did not meet the requirements for immigration to Canada. The Officer provided a table outlining the points that had been awarded for each of the selection. The Applicant received maximum points for age and experience, 20/25 for education, 4/10 for adaptability, and no points for official language proficiency and arranged employment. In total, the Applicant received 55 out of 100 points, which was below the minimum requirement of 67 points. He was short 12 points. The English language proficiency may award up to 16 points.

[9] The Officer wrote:

On 10 March 2009, you were informed that the material you had submitted in support of your claimed language ability was found to be inconclusive and you were asked to provide results of the International English Language Testing System (IELTS) examination. You were warned in the request letter that if the results were not received within 60 days, it could lead to your application being refused. You have failed to provide IELTS results. As such, I have no basis upon which to assess your English language proficiency and have accordingly awarded 0 points.

[10] The Officer refused the Applicant's application for permanent residence.

Relevant Legislation

[11] The *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the *Regulations*)

provide:

75. (1) For the purposes of subsection 12(2) of the Act, the federal skilled worker class is hereby 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.
Skilled workers

(2) A foreign national is a skilled worker if
(a) within the 10 years preceding the date of their application for a permanent resident visa, they have at least one year of continuous full-time employment experience, as described in subsection 80(7), or the equivalent in continuous part-time employment in one or more occupations, other than a restricted occupation, that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the National Occupational Classification matrix;
(b) during that period of employment they performed the actions described in the lead statement for the occupation as

75. (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des travailleurs qualifiés (fédéral) est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada, qui sont des travailleurs qualifiés et qui cherchent à s'établir dans une province autre que le Québec.
Qualité

(2) Est un travailleur qualifié l'étranger qui satisfait aux exigences suivantes :
a) il a accumulé au moins une année continue d'expérience de travail à temps plein au sens du paragraphe 80(7), ou l'équivalent s'il travaille à temps partiel de façon continue, au cours des dix années qui ont précédé la date de présentation de la demande de visa de résident permanent, dans au moins une des professions appartenant aux genre de compétence 0 Gestion ou niveaux de compétences A ou B de la matrice de la Classification nationale des professions — exception faite des professions d'accès limité;

set out in the occupational descriptions of the National Occupational Classification; and

(c) during that period of employment they performed a substantial number of the main duties of the occupation as set out in the occupational descriptions of the National Occupational Classification, including all of the essential duties.

76. (1) For the purpose of determining whether a skilled worker, as a member of the federal skilled worker class, will be able to become economically established in Canada, they must be assessed on the basis of the following criteria:

(a) the skilled worker must be awarded not less than the minimum number of required points referred to in subsection (2) on the basis of the following factors, namely,

(i) education, in accordance with section 78,

(ii) proficiency in the official languages of Canada, in accordance with section 79,

(iii) experience, in accordance with section 80,

(iv) age, in accordance with section 81,

(v) arranged employment, in accordance with section 82, and

(vi) adaptability, in accordance with section 83; and

(b) the skilled worker must

(i) have in the form of transferable and available funds, unencumbered by debts

b) pendant cette période d'emploi, il a accompli l'ensemble des tâches figurant dans l'énoncé principal établi pour la profession dans les descriptions des professions de cette classification;

c) pendant cette période d'emploi, il a exercé une partie appréciable des fonctions principales de la profession figurant dans les descriptions des professions de cette classification, notamment toutes les fonctions essentielles.

76. (1) Les critères ci-après indiquent que le travailleur qualifié peut réussir son établissement économique au Canada à titre de membre de la catégorie des travailleurs qualifiés (fédéral) :

a) le travailleur qualifié accumule le nombre minimum de points visé au paragraphe (2), au titre des facteurs suivants :

(i) les études, aux termes de l'article 78,

(ii) la compétence dans les langues officielles du Canada, aux termes de l'article 79,

(iii) l'expérience, aux termes de l'article 80,

(iv) l'âge, aux termes de l'article 81,

(v) l'exercice d'un emploi réservé, aux termes de l'article 82,

(vi) la capacité d'adaptation, aux termes de l'article 83;

b) le travailleur qualifié :

(i) soit dispose de fonds transférables — non grevés de dettes ou d'autres obligations

or other obligations, an amount equal to half the minimum necessary income applicable in respect of the group of persons consisting of the skilled worker and their family members, or (ii) be awarded the number of points referred to in subsection 82(2) for arranged employment in Canada within the meaning of subsection 82(1).

financières — d'un montant égal à la moitié du revenu vital minimum qui lui permettrait de subvenir à ses propres besoins et à ceux des membres de sa famille,
(ii) soit s'est vu attribuer le nombre de points prévu au paragraphe 82(2) pour un emploi réservé au Canada au sens du paragraphe 82(1).

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) soit fait évaluer ses compétences dans ces langues par une institution ou organisation désignée aux termes du paragraphe (3);
b) soit fournit une autre preuve écrite de sa compétence dans ces langues.

(a) have their proficiency in those languages assessed by an organization or institution designated under subsection (3); or
(b) provide other evidence in writing of their proficiency in those languages.

(emphasis added)

Issues

[12] The Applicant frames the issues as follows:

- i) What is the standard of review?
- ii) Is the decision unfair because the Officer should have extended the period of time to provide the IELTS result until after the Applicant was able to write the test and receive the result?

- iii) Did the Officer err in law or make an unreasonable decision by failing to grant the applicant language points based on the other evidence of his English language ability provided in the application?

Analysis

Standard of Review

[13] I agree with the parties that the applicable standard of review for questions of procedural fairness is correctness, whereas questions of fact and mixed fact and law attract the standard of reasonableness. *Dunsmuir v New Brunswick*, 2008 SCC 9; *Kuhathasan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 457.

Extension of time

[14] The Applicant points out that it was not possible to provide the IELTS results by the deadline because the earliest test date available was after the deadline. The Applicant points out that on February 12, 2009 his representative had informed the Officer that the results would be provided when available.

[15] The Applicant submits that the Officer denied the Applicant procedural fairness by refusing the application without waiting for the results. The Applicant cites *Gakar v Canada (Minister of Citizenship and Immigration)*, [2000] 189 FTR 306 (*Gakar*) to argue that an officer should entertain reasonable requests for extension of time. In that case, the officer gave the applicant 30 days to

provide proof that his university studies had been full-time. Nine days before the deadline, the Applicant's representative requested an additional 30 days, as the Applicant had been unable to obtain the necessary documents. The Officer refused, and denied the application. Upon judicial review, Justice Teitelbaum found there was a breach of the duty of fairness when the officer denied the extension of time, noting at paras 32 and 39:

A visa officer must be flexible and understanding when interviewing an applicant. The visa officer gives no valid reason for having refused the present applicant the extension he requested. The applicant was given 30 days to file documentary evidence that he was a full time student when he obtained a Bachelor's degree in Commerce from Osmania University. According to the visa officer's affidavit, she found it unusual that full-time studies in one year would only contain three major subjects and two language subjects. I can find no sound basis for this conclusion.

...

As I have said, and I repeat, a visa officer must be understanding and must be flexible in deciding on a request for an extension of time. To simply say no is a breach of natural justice.

[16] The Applicant submits that there was no explanation as to why the Officer could not have given the Applicant enough time to complete the test, and that there was no evidence in the reasons that the Officer even considered extending the time. The Applicant submits that failure to consider an extension of time request constitutes a fettering of discretion and is a breach of fairness.

[17] However, the Applicant did not provide the Officer with any notion of how much extra time he would need, nor did he provide any documentation to confirm that he had registered for the exam. It was approximately a month later that the Applicant was advised of the deficiencies in the application and requested to submit his IELTS results.

[18] The Applicant concedes that no specific extension of time was made as had been made in the *Gakar* case.

[19] The Respondent points out that the Officer did not refuse to accept further written evidence of the Applicant's English language proficiency but rather provided the Applicant with a specific deadline and a caution that no further notice would be forthcoming.

[20] According to the Computer Assisted Immigration Processing System (CAIPS) notes, the Officer noted on March 10, 2009:

- Request sent today – 60 days to respond:
- a. IELTS's testing (Consultant reports registered for exam)

[21] The Officer did not receive a response to the above request and later recorded in CAIPS:

Applicant claimed high proficiency language points for English. A review of the file revealed language test results were required. Applicant was requested: 10Mar09, to submit within 60 days, English language test results. Applicant was informed that failure to comply would result in refusal of the application.

[22] The Applicant replies that the Officer did not explain why she could not continue to wait for the IELTS results, given that the Applicant had to wait for two years just to have his application opened for review.

[23] I agree with the Respondent. The fact that the Applicant had waited two years for the visa office to open his visa application has no relevant bearing on this issue. Had the Applicant formally

requested an extension of time, it may have been a reviewable error for the Officer to ignore this request, as suggested by the case law cited by the Applicant. In the Applicant's affidavit there is the mention that "Premiers confirmed that the copy of the payment receipt for the IELTS exam would be enough to get an extension of time from the Canadian High Commission to submit my IELTS results after the deadline". However, nowhere is there is record of an actual request to extend the deadline or indication of a specific date for delivery of the test results.

[24] It does not make sense to me to expect the Officer to wait indefinitely for the requested results to be submitted. Nor do I consider the Officer to be obligated to contact the Applicant beyond the request and caution provided to the Applicant. In this circumstance, I find the Officer did not err in not granting an extension of time for the IELTS results.

Other Evidence of Language Proficiency

[25] The Applicant points out that he had provided evidence in writing that he was highly proficient in English, including a claim of English proficiency in his curriculum vitae, education transcripts confirming passing grades in secondary and post secondary English language courses. The Applicant submits that the Officer's failure to perform any assessment of the Applicant's written evidence is an error of law.

[26] The Applicant points out the Officer completely ignored this other evidence of English proficiency, stating instead that there was no basis upon which to assess the Applicant's English

proficiency. The Applicant submits that the Officer's failure to perform any assessment of the Applicant's English is a legal error.

[27] The Applicant refers to *Islam v Canada (Minister of Citizenship and Immigration)*, 2006 FC 424 (*Islam*) which involved a situation in which the applicant opted to submit written evidence of his English language proficiency under s.79(1)(b) of the *Regulations*. He was then notified by the visa office that the written submissions did not support the level of proficiency he had claimed and that further written submissions would not be accepted. He was given the option to submit language test results, which he did not do. At an interview, the officer administered a writing test. Justice Campbell found that the visa officer did not have the statutory authority to take her writing test into consideration, and instead should have made her determination by using the written submissions, as prescribed by the *Regulations*.

[28] In *Al-Kassous v Canada (Minister of Citizenship and Immigration)*, 2007 FC 541 (*Al-Kassous*), the applicant, who had lived in France for 8 years and had completed both Bachelor's and Master's degrees from a French institution, provided written submissions as evidence of his French proficiency. The Officer found the submissions to be inconclusive and required instead language proficiency test results. Justice Teitelbaum quoted the principle set out in *Islam*:

...if a second chance to meet the requirements of section 79 is provided then it is a breach to preclude an applicant from exercising one of the options provided in section 79. Here it was clear from the letter of November 26, 2005 that no decision had been made and that the applicant was being given a second chance to meet the requirements of section 79. Therefore, I find that the Officer breached the duty of procedural fairness. (para 16)

[29] Justice Teitelbaum then himself concluded:

Subsection 79(2) of the Regulations states that the assessment of points for proficiency of the official languages are to be awarded based on the Canadian Language Benchmarks (Standards linguistiques Canadiens for French). The CAIPS notes state only that "I am not satisfied that subject has demonstrated French language ability at benchmark 8". This conclusion appears to be based entirely on the fact that the applicant's studies in France were concluded 17 years ago as the CAIPS notes contain no reference to the applicant's writing sample. The applicant's writing sample was an important part of his submissions. The Officer was required to assess the applicant's French language ability with reference to the information about the applicant's experience with French as well as on the writing sample provided. In my opinion, the failure to assess the writing sample in accordance with the Canadian Language Benchmarks makes the decision unreasonable. (para 24)

[30] The Respondent points out that in the present case the Officer did not refuse to accept further written evidence of the Applicant's English language proficiency but rather provided the Applicant with 60 days time but received no response. The Respondent also points out that the Applicant chose to elect taking the test instead of providing other written proof as in *Islam* and *Al-Kassous*.

[31] I find the cases helpful in that they highlight that it is an error to preclude an applicant from exercising one of the options provided in s.79 of the Regulations, which includes making written submissions in support of one's official language proficiency. In other words, the Officer may not insist on using only the language test results as a basis for determining the applicant's language proficiency.

[32] The Respondent makes a distinction between the *Islam* and *Al-Kassous* cases from the present case at bar on the basis that here the Applicant had indicated that he would provide the exam results as proof of his language proficiency and that there was no indication of the Applicant's intention to rely on other written evidence to establish his language proficiency.

[33] I would not accept this argument of the Respondent as there is no explicit requirement in the *Regulations* that the Applicant elect to choose one method of proof of language proficiency over the other. I also think that the Applicant, in submitting his declaration of proficiency and his English grades, would expect this evidence to be part of the material the Officer would consider if necessary.

[34] Paragraph 79(1)(b) of the *Regulations* requires that an officer consider other evidence in writing language proficiency as an alternative to a language test result. As evidence of his English proficiency, the Applicant submitted a curriculum vitae where he described his language capabilities as being "very good in English (reading, writing, and speaking)". The Applicant also submitted a certified transcript from the University of Jordan which listed that he had passed an English course in the 1994-1995 year, as well as a Ministry of Education General Secondary Study Certificate Examination of 1993 showing that he had passed "English Language" with a score of 155 out of 200.

[35] The Officer had noted on March 10, 2009 in the CAIPS notes:

LANG: no evidence. Will request IELTS.”

(emphasis added)

[36] On June 19, 2009 , the Officer recorded:

The applicant claimed high proficiency language points for English. A review of the file revealed language test results were required. Applicant was requested: 10Mar09, to submit within 60 days, English language test results. Applicant was informed that failure to comply would result in refusal of the application.

I have reviewed the file. In the absence of test results, I am not satisfied that applicant meets the Canadian Language benchmarks, at least at the stated level, and I have therefore awarded 0 points for English language proficiency.

(emphasis added)

[37] The Officer then wrote to the Applicant stating:

On 10 March 2009, you were informed that the material you had submitted in support of your claimed language ability was found to be inconclusive and you were asked to provide results of the International English Language Testing System (IELTS) examination. You were warned in the request letter that if the results were not received within 60 days, it could lead to your application being refused. You have failed to provide IELTS results. As such, I have no basis upon which to assess your English language proficiency and have accordingly awarded 0 points.

(emphasis added)

[38] While I appreciate the Respondent's submission that this is not enough to completely establish the Applicant's English language proficiency, it is factually inaccurate for the Officer to state that there was "no evidence" of the Applicant's language ability, and "no basis upon which to assess your English language proficiency", as there clearly was some evidence of some English language ability.

[39] In *Shaker v Canada (Minister of Citizenship and Immigration)*, 2006 FC 185 (*Shaker*), the applicant submitted six manuscript pages as proof of his current level of official language proficiency. The officer awarded the applicant zero points, noting grammatical mistakes in the manuscript submissions. Justice Beaudry allowed the application, commenting:

While the presence of many mistakes in the applicant's manuscript and the relatively poor grades he obtained while studying English certainly would not warrant the attribution of full marks, I find that it was patently unreasonable for the Officer to attribute him a score of zero. The applicant's evidence reveals that he has considerable experience working in English, and though his mastery of the language is certainly less than perfect, he clearly has the ability to communicate in English at some level. (at para 42)

[40] In my view it is unreasonable for the Officer to award zero points for the Applicant's official language proficiency concluding there was "no basis" and "no evidence" when the Applicant had clearly provided some evidence of his English proficiency. While the evidence provided may be considered insufficient, subsection 79(1)(b) requires assessment of that evidence as an alternative to the IELTS's test results and it was not open to the Officer to ignore it altogether.

Conclusion

[41] Section 79 of the *Regulations* has now been changed to require language test results to assess an applicant's language proficiency. However, at the relevant time of the application, the provision provided for two ways of proving an applicant's language proficiency: through the language exam results or other written submissions.

[42] I find the Officer was required to consider the written evidence the Applicant had submitted which included transcripts of English courses he had taken. While such evidence may not have warranted sufficient marks, it was an error for the officer to disregard the evidence altogether and instead declare there was "no basis" upon which to assess the Applicant's English language proficiency.

[43] I therefore grant the application for judicial review.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is granted and the matter is remitted for reconsideration by a differently constituted panel.
2. The parties have not proposed any question for certification and no certification of a general question of importance is made.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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