Federal Court  Cour fédérale

Date: 20120213

Docket: IMM-3778-11

Citation: 2012 FC 203

Ottawa, Ontario, February 13, 2012

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

MA LI LIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review in respect of a decision rendered by a Designated Immigration Officer [the Officer] at the Canadian Consulate General in Hong Kong, on March 25, 2011 [the Decision]. In the Decision, the Officer refused the applicant's application for a permanent resident visa as a member of the Federal Skilled Worker Program [FSWP], finding her to be just one point shy of the 67 points required to qualify under the FSWP.

[2] In her Notice of Application and Memorandum of Fact and Law, the applicant argued that the Decision should be set aside both because it was unreasonable and because the Officer allegedly committed a breach of procedural fairness. At the outset of the hearing, counsel for the applicant abandoned the challenge to the Decision based on lack of reasonableness and confirmed that the sole basis for review centered on the alleged breach of procedural fairness. More specifically, the applicant asserts that the Officer's use of a grid to correlate the raw test scores the applicant achieved on the International English Language Testing System [IELTS] test to the points required under the *Canadian Language Benchmark, 2000* [the benchmark], prescribed by subsection 79(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], amounted to a breach of procedural fairness because a change made by the respondent to the grid in 2008 was not promulgated in the *Canada Gazette* or otherwise broadly broadcast to immigration practitioners. At the material time, the Regulations allowed an applicant to demonstrate language proficiency either by taking a test like the IELTS test or by having a language assessment performed by an officer.[1] The applicant argues that, had she been aware of the change to the correlation grid, she would not have taken the IELTS test and instead would have opted to have her language proficiency tested by the Officer.

[3] For the reasons set out below, I am of the view that there was no breach of procedural fairness committed by the Officer and that, accordingly, this application should be dismissed.

[1] Subsequent to the events giving rise to the present application, section 79 of the Regulations was amended by SOR/2011-54 to remove the option to demonstrate language proficiency by means of other written evidence instead of by taking a standardized test through an organization designated by the Minister.

Factual Background

[4] The applicant is a citizen of China. She states in her Affidavit filed in support of the present application for judicial review that she made her application under the FSWP in approximately July 2009. The Record reveals that her application was received by the Consulate General in Hong Kong on September 28, 2009.

[5] The applicant further deposes in her Affidavit that she retained what she terms a "self-acclaimed immigration consultant" in China to assist with the preparation of her application, and that in preparing her application she and the consultant sought guidance from an August 2008 publication of the respondent, entitled "Simplified Process Guide (IMM ESAP 7000)". That Guide does not set out how scores obtained on the IELTS test are to be correlated to the benchmark points prescribed by subsection 79(2) of the Regulations.

[6] The applicant also deposes in her Affidavit that in preparing her FSWP application, she and her consultant calculated that she would receive 12 points for language proficiency and believed that she could achieve this point rating if she demonstrated high proficiency in two of the four abilities measured by the IELTS test, namely reading, writing, speaking and listening, and achieved a medium proficiency rating in the other two abilities. The applicant, however, does not claim that this assessment was based on any representation made to her by the respondent. Rather, it would appear that the consultant formulated this opinion based on an outdated correlation grid that was no longer in use by the respondent in 2009. The applicant did not inform the Officer of the estimates she and her consultant had done in respect of the conversion of IELTS scores to the numbers under the benchmark.

[7] The applicant took the IELTS test on November 7, 2009 and achieved a raw score of 7.0 for reading, 7.0 for listening, 6.0 for writing and 6.0 for speaking. The Officer applied the correlation grid contained in the respondent's Operation Manuals in both 2009 and 2010 and obtained the following results:

Raw IELTS test score achieved by the applicant	**Points for the FSWP application**
Reading – 7.0	Benchmark - High – 4 points
Listening – 7.0	Benchmark - Moderate – 2 points
Writing – 6	Benchmark - Moderate – 2 points
Speaking – 6	Benchmark - Moderate – 2 points

[8] There is no dispute that the Officer correctly applied the grid in force in 2009 and 2010 to the raw test scores the applicant achieved on the IELTS test.

[9] The grid in the Policy Manual changed effective November 28, 2008. Prior to that date, the same correlation existed for each of the four evaluated criteria between the test ability raw data achieved on the IELTS test and the benchmark. In other words, a "7" or higher on each ability score on the IELTS test translated into a "4" for purposes of the benchmark. The respondent changed the grid in 2008 for certain of the criteria because a study it had conducted indicated that the relationship between the IELTS bands and the benchmark levels was not consistent across the four abilities and a higher score for listening and lower scores for each of the other abilities were required. Thus, from 2008 forward, an applicant needed to achieve a "7.5" or higher for listening on the IELTS to be rated in the "high" category under the benchmark but only a "6.5" for the other abilities to be rated in the "high" category for purposes of the benchmark.

[10] In this application for judicial review, the applicant asserts that the respondent ought to have given notice of its change to the grid by way of publication in the *Canada Gazette* or through some other means, like a general bulletin to all immigration practitioners. The applicant asserts that the failure to so publicize the change in the correlation grid amounts to a breach of procedural fairness by the respondent. She also claims that, had she known of the change, she would have availed herself of the option (that then existed) of having her language ability evaluated by the Officer, as opposed to taking the IELTS test.

[11] The uncontradicted evidence before the Court establishes that the new correlation between the IELTS raw data and the benchmark levels was clearly set out in the brochures the respondent provided to FWSP applicants that accompanied the FSWP application forms in July and September of 2009 (the dates when the applicant made her application and when it was received by the respondent).

[12] Thus, had the applicant or her consultant read the material that the respondent provided with FSWP application packages in July 2009, the change in the correlation grid would have been readily apparent.

Analysis

[13] The applicant argues that the present case is substantially similar to the situations in *Noor v Canada (Minister of Citizenship and Immigration)*, 2011 FC 308, [2011] FCJ No. 388, [*Noor*] and *Vikas v Canada (Minister of Citizenship and Immigration)*, 2009 FC 207, [2009] FCJ No. 230, [*Vikas*] where this Court set aside decisions made by visa officers under the FSWP, due to denials

of procedural fairness. In both cases, the Court was careful to state that its findings were limited to the “unique facts” or “distinct situation” that pertained in them.

[14] In *Noor*, the applicant failed to provide residency documents that were newly-required by the respondent due to a change in administrative policy. However, in that case, unlike the present situation, the evidence before the Court revealed that the applicant had submitted an outdated application package to the visa officer that referred to the previous documentary requirements. The Court reasoned that it was clear to the visa officer that the applicant was relying on the outdated information and that the applicant, in that distinct situation, ought to have been afforded the opportunity to submit the missing documents (which were readily obtainable). Here, on the other hand, there was no basis upon which the Officer could have known that the applicant was relying on an outdated version of the correlation grid.

[15] The situation in *Vikas* is less pertinent. There, the officer conducted an interview, questioned the applicant about his work experience and made a calculation as to the number of months the applicant had worked but did not share the results with the applicant. In so doing, the officer was required to convert part-time hours worked by the applicant to full-time equivalencies, and there was the possibility for some interpretation in his calculations. In result, the visa officer found the applicant lacked less than two months experience required to qualify him for a permanent residency visa under the FSWP. In those unique circumstances, the Court held that the visa officer owed a duty of procedural fairness to share the results of his calculation with the applicant. Here, on the other hand, no interview was conducted and there was nothing subjective about the conversion done under the grid.

[16] Both *Noor* and *Vikas*, in my view, are readily distinguishable from the present situation. Here, there was no basis for the Officer to have known that the applicant was relying on an outdated version of the correlation grid, and the very documents that accompanied the FSWP application package clearly specified what grid was being applied. As I have already indicated, had the applicant or her consultant merely read the documents available to her, the basis for language assessment would have been readily apparent.

[17] In the circumstances, there was no denial of procedural fairness by the Officer and no obligation for the respondent to publicize the change in the correlation grid in the manner sought by the applicant.

[18] No question for certification under section 74 of IRPA was presented and none arises in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review of the Officer's Decision is dismissed.

2. No question of general importance is certified.

Mary J. L Gleason
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Max Chaudhary	FOR THE APPLICANT
Nina Chandy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Chaudhary Law Office Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan, Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT