

Federal Court



Cour fédérale

Date: 20101006

Docket: IMM-1291-10

Citation: 2010 FC 995

Ottawa, Ontario, October 6, 2010

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

MD. KHAIRUL KABIR

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. MD. Khairul Kabir (the “Applicant”) seeks judicial review of the decision of an Immigration Officer (the “Officer”) made at the Canadian High Commission, Singapore, on November 25, 2009. In that decision the Officer refused the Applicant’s application for permanent residence in Canada as a member of the Skilled Worker class.

[2] The Applicant is a citizen of Bangladesh. He and his wife seek entry into Canada as permanent residents. The Applicant had attained the educational qualifications of a Bachelor’s

degree in Political Science, a Master's degree in Political Science and a Master's of Business Administration. He also holds a Diploma in Fashion Merchandising. In total, the Applicant has completed eighteen years of full-time study.

[3] His wife holds a Bachelor's degree of Social Science, a Diploma of Computer Studies and a Master's degree of Social Science in Political Science. She has completed fifteen years of full-time study.

[4] The Officer determined that the Applicant earned 22 points for education, on the basis of the educational credentials he had achieved. The Officer found that the Applicant's highest educational credential was the Master's in Social Science which requires sixteen years of full-time study. No points were awarded for the second degree at the Master's level nor for the Diploma in Fashion Merchandising because the Diploma was not in the line of progression toward the highest educational credential.

[5] The Officer assessed the education of the Applicant's wife as requiring sixteen years for completion. The Officer found that the highest education held by Mrs. Kabir was the Master's in Social Science. No points were awarded in respect of the Diploma because it was not in the line of progression toward the highest educational credential. The Officer awarded 4 points, under the heading of "Adaptability", to the Applicant's point count in respect of his wife's education.

[6] The Applicant argued, in oral submissions, that the Officer's decision is wrong in law. He submits that in denying credit for his second Master's degree and the Diploma, the Officer erred in interpreting subsections 78(3) and 78(4) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. In his written submissions the Applicant argued alternatively that the decision raises a question of mixed fact and law and is reviewable on the standard of reasonableness.

[7] The Minister of Citizenship and Immigration (the "Respondent") submits that the question in issue is one of mixed fact and law and accordingly, subject to review on the standard of reasonableness.

[8] In my opinion, the Respondent's argument is the preferred position. The issue in this proceeding is whether the Officer committed a reviewable error in assessing the Applicant's application for permanent residence specifically in relation to the assessment of his educational qualifications and those of his wife.

[9] This case parallels the facts and issues that were discussed in *MD. Ali Khan v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 983, and will be decided accordingly.

[10] Section 78 of the Regulations deals with the assessment of educational credentials. "Educational credential" is defined in section 73 of the Regulations as follows:

"educational credential"

« diplôme »

« diplôme »	“educational credential”
<p>“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.</p>	<p>« 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.</p>

[11] Paragraph 78(3) is relevant and provides as follows:

Multiple educational achievements	Résultats
(3) For the purposes of subsection (2), points	(3) Pour l’application du paragraphe (2), les points sont accumulés de la façon suivante:
(a) shall not be awarded cumulatively on the basis of more than one single educational credential; and	a) ils ne peuvent être additionnés les uns aux autres du fait que le travailleur qualifié possède plus d’un diplôme;
(b) shall be awarded	b) ils sont attribués:
(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	(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) for the purposes of subparagraph (2)(e)(ii), on the basis of the combined educational credentials referred to in that paragraph.

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

[12] The plain language of this provision says that points will not be awarded for two or more educational credentials. This means that although the Applicant holds two degrees at the Master's level he will not receive double points.

[13] The Officer researched the period of full-time studies required to obtain a Master's degree in Bangladesh and determined that 16 years of full-time studies are required. She also decided that the diploma obtained by the Applicant in 1999 did not qualify as augmenting the number of years required to attain his highest academic credential because it was not part of the progression towards obtaining a Master's degree in 1989. Similarly, the Officer decided that Mrs. Kabir's Diploma was not part of the progression towards obtaining her Master's degree.

[14] The Officer awarded the Applicant 22 points for his education, pursuant to paragraph 78(2)(e) of the Regulations which provides as follows:

(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

e) 22 points, si, selon le cas:

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

temps plein,

(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

(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;

[15] The Applicant argues that the officer erred and should have awarded him 25 points on the basis of paragraph 78(2)(f) which provides as follows:

(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.

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

[16] The Applicant also submits that the Officer erred in assessing Mrs. Kabir's academic credentials in the same way, so that the Applicant should have received 5 points for adaptability on the basis of Mrs. Kabir's education.

[17] I do not accept the Applicant's submissions. The language of subsection 78(3) is clear. No points can be awarded for two Master's degrees. The Applicant completed 18 years of full-time studies but only 16 years were required in Bangladesh in order to obtain a Master's degree. Mrs. Kabir completed her Master's degree in 15 years. Both fall 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.

[18] The Applicant relies on subsection 78(4) of the Regulations and the decision of Justice Mandamin in *McLachlan v. Canada (Citizenship and Immigration)*, 2009 FC 975. In that case the Court held that subsection 78(4) is engaged where an individual has attained an academic credential but not the specified years of study. If adequate special circumstances exist the applicant should be awarded the number of points corresponding to the academic credential attained, notwithstanding that the applicant has not completed the specified years of study. The application was allowed due to the visa officer's failure to consider the special circumstances of that case.

[19] In *Perez Arias v. Canada (Citizenship and Immigration)*, 2009 FC 1207, I discussed the principle of judicial comity as follows:

[20] I am mindful that the principle of judicial comity must be taken into account when a judge of the Court purports to depart from a prior decision of the Court. In this regard, I refer to the decision in *Almrei v. Canada (Citizenship and Immigration)* 2007 FC 1025 (CanLII), (2007), 316 F.T.R. 49 at paras. 61 and 62 where Justice Lemieux said the following about judicial comity:

(3) The principle of judicial comity

61 The principle of judicial comity is well-recognized by the judiciary in Canada. Applied to decisions rendered by judges of the Federal Court, the principle is to the effect that a substantially similar decision rendered by a judge of this Court should be followed in the interest of advancing certainty in the law....

62 There are a number of exceptions to the principle of judicial comity as expressed above they are:

1. The existence of a different factual matrix or evidentiary basis between the two cases;
2. Where the issue to be decided is different;
3. Where the previous condition failed to consider legislation or binding authorities that would have produced a different result, i.e., was manifestly wrong; and
4. The decision it followed would create an injustice [citations omitted].

[20] In my opinion, the first and third exceptions from *Almrei* apply here. The Applicant has not put forward any special circumstances that the Officer failed to consider.

[21] The third exception from *Almrei* is particularly relevant.

[22] This Court in *Bhuiya* decided that where an applicant had achieved an academic credential in less years than specified, subsection 78(4) allowed a visa officer to award points corresponding to the number of years of education, not the full points of the level of the academic credential attained. Subsection 78(4) cannot be used to award an applicant full points for an academic credential in special circumstances notwithstanding that he or she has not completed the requisite years of study.

[23] In the result, this application for judicial review is dismissed.

[24] Counsel for the parties have exchanged correspondence concerning a question for certification. The test for certification is whether the case raises a question of general importance

which would be dispositive of an appeal; see *Canada (Minister of Citizenship and Immigration) v. Zazai* (2004), 247 F.T.R. 320 (F.C.A.).

[25] Counsel for the Respondent has proposed the following question:

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

[26] In light of the fact that there are differing judicial views about the assessment of educational qualifications, I am satisfied that the question cited above should be certified in this proceeding, even though the same question was certified in *MD. Ali Khan v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 983.

ORDER

THIS COURT ORDERS that the application for judicial review is dismissed. The following question is certified:

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

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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THE MINISTER OF CITIZENSHIP AND
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**REASONS FOR ORDER
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