

Date: 20080222

Docket: IMM-6746-06

Citation: 2008 FC 243

Ottawa, Ontario, February 22, 2008

PRESENT: The Honourable Barry Strayer, Deputy Judge

BETWEEN:

SYLVIA FERNANDES

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is an application for a judicial review of the decision of a Visa Officer dated October 12, 2006 refusing the Applicant's application for a permanent resident visa.

Facts

[2] On May 22, 2004 an Immigration Consultant submitted an application on behalf of the Applicant for a permanent residence visa. Under the heading of "Knowledge of English and other

Languages” he suggested that the Applicant should be assessed as her first language being English. He explained that she had studied throughout in schools and college where English was the medium of instruction and at her workplace (the last being in Dubai) the language of communication was English. He pointed out that she had 15 years of experience in her intended occupation and he gave details which showed quite an extensive range of administrative experience. He described under the heading “Adaptability” the education of her husband who was said to have a Bachelor of Arts degree. He added as part of the Personal Background of the Applicant the following:

She possesses strong problem solving abilities and performs her duties effectively and efficiently. She has always shown intense involvement in all of her jobs and has the capacity to sustain hard work... [She] is a very adaptable, motivated and resourceful individual, she would have no problem in economically establishing herself in Canada.

In his conclusion he stated:

The units of assessment that Mrs. Sylvia Margaret Irene Fernandes has received against the factor mentioned in s. 76 of I&RPR do not reflect her true chances of becoming economically established in Canada because of the facts highlighted in the above given heading – Personal Background.

You are therefore requested to consider the above mentioned facts by using positive discretion and approve Mrs. Sylvia Margaret Irene Fernandes’ application for permanent residence in Canada under the provisions of ss. 76(3) of I&RPR after verifying the highlighted facts in a personal interview with Mrs. Sylvie Margaret Irene Fernandes.

He made a summary of his proposed units of assessment. These would have totalled 77, the minimum required being 67.

[3] The Applicant and her husband were interviewed by the Visa Officer. Notwithstanding that the husband produced a diploma from Mysore University in India the Officer asked him about his University experiences (he graduated in 1982 and the interview took place on September 21, 2006) and why he was working as a motor mechanic when he had obtained a BA in political science and history. She was not satisfied with the answers and therefore gave the Applicant no points for “Adaptability” based on the spouse’s prospects.

[4] In her decision of October 12, 2006 the Officer set out the points assessed by her. They were the same as the points proposed by the Applicant’s consultant except that he recommended 16 points for the Applicant’s first official language proficiency and the Officer awarded 12. He suggested four points for adaptability and she ordered none. The net result was that the total points awarded were 63, four points short of the required 67. She stated her conclusion in two ways as follows:

You have not obtained sufficient points to satisfy me that you will be able to become economically established in Canada. I have communicated my concerns to you and taken your reply into consideration.

...

Following an examination of your application, I am not satisfied that you meet the requirements of the Act and the Regulations for the reasons explained above. I am therefore refusing your application.

[5] The Applicant seeks to have this decision set aside on two grounds: first that the Officer failed to consider the exercise of discretion under subsection 76(3) of the *Immigration and Refugee*

Protection Regulations; and second, that the Officer erred in not awarding four points to the Applicant under the Adaptability factor in respect of her husband's education and abilities.

Analysis

[6] Subsection 76(1) and (2) of the Regulations set out the criteria for the application of the point system to an applicant for permanent residence. Subsection 76(3) then goes on to say:

(3) Whether or not the skilled worker has been awarded the minimum number of required points referred to in subsection (2), an officer may substitute for the criteria set out in paragraph (1)(a) their evaluation of the likelihood of the ability of the skilled worker to become economically established in Canada if the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada.

(3) Si le nombre de points obtenu par un travailleur qualifié — que celui-ci obtienne ou non le nombre minimum de points visé au paragraphe (2) — ne reflète pas l'aptitude de ce travailleur qualifié à réussir son établissement économique au Canada, l'agent peut substituer son appréciation aux critères prévus à l'alinéa (1)a).

There is nothing in the Officer's decision to indicate that she considered the question of whether a favourable discretion should be exercised in respect of the Applicant. The Respondent relies on the passage quoted above where the Officer says that she is not satisfied "that you will be able to become economically established in Canada". It is said that this tracks certain language in subsection 76(3) and thus indicates some attention to the exercise of the discretion provided there. But it is equally true that it tracks language in subsection 76(1) setting out the point system requirement. The passage quoted follows immediately after the statement that the Applicant had not

met the requisite number of points in her assessment and this seems to be simply an affirmation of the result that the Applicant had not met the requirements of subsection 76(1) and (2).

[7] It is clear that the purpose of subsection 76(3) is to allow an exception to be made to the point system where the Applicant's chances of becoming successfully established in Canada is greater than is reflected in the points assessment: see e.g. *Yeung v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1174 at para. 15. To obtain such advantage the Applicant must request the exercise of the discretion and must give some good reasons for it: see *Lam v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1239 at para. 5. However, such reasons need not be elaborate and may consist of a more full description of the Applicant's background, education, and work experience and knowledge of an official language of Canada: see *Nayyar v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 342 at para. 12.

[8] What is being alleged here is the failure of the Visa Officer to consider the question of whether the discretion should be exercised, not that it was exercised wrongly. While a failure to exercise the discretion has often been treated as a breach of procedural fairness (see e.g. *Nayyar*, *supra*, at para. 8) it appears to me to involve a question of law: namely has the Visa Officer taken every step that the law requires? In either case the standard of review is correctness and that is a standard I will apply to this issue.

[9] There is no evidence in the record or in the decision that the Officer in this case considered subsection 76(3) or the exercise of the discretion which it authorizes. The Respondent referred me

to many cases where this Court has said that in the exercise of the discretion under subsection 76(3) with a negative result it is not necessary for an officer to give reasons: *Channa v. Canada (Minister of Citizenship and Immigration)*, 1996 124 F.T.R. 290 at para. 18; *Feng v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1226 at para. 18; and *Mamun v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 141 at para. 11. I believe it is clear from these cases, however, that when it is said that an officer need give no reasons for refusing to exercise a discretion what is meant is that an officer need give no reasons for exercising the discretion negatively. But it must be clear that the Visa Officer did consider whether the discretion should be exercised in favour of the Applicant: see *Tathgur v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1662 at paras. 29-35.

[10] As there was nothing to indicate that the Visa Officer here did consider exercising the discretion under subsection 76(3) she erred in law and the decision must be set aside.

[11] With respect to the Applicant's assertion that the Visa Officer erred in not awarding four points for Adaptability based on her husband's education, this would be a decision whose standard of review would be reasonability, involving as it does a mixed question of law and fact. I am not satisfied on the evidence that the Officer made an unreasonable decision in this respect. There is some conflict in the evidence as to whether the Officer squarely raised her concern with the Applicant and her husband as to the husband's University education and the Applicant's affidavit is not sufficiently detailed to support her position. While the Visa Officer's concerns about the

husband's degree may seem open to question, I am unable to say on the record before me that they were unreasonable.

Disposition

[12] The decision of the Visa Officer of October 12, 2006 will be set aside and the matter referred back to another visa officer for reconsideration. Counsel had no questions to suggest for certification and none will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The decision of the Visa Officer of October 12, 2006 be set aside and the matter referred back to another visa officer for reconsideration in accordance with these reasons.

"B.L. Strayer"
Deputy Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6746-06

STYLE OF CAUSE: SYLVIA FERNANDES
and
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Applicant

Respondent

PLACE OF HEARING: TORONTO, ONTARIO

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REASONS FOR : STRAYER, D.J.

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