Federal Court  Cour fédérale

Date: 20130627

Docket: IMM-6805-12

Citation: 2013 FC 722

Ottawa, Ontario, June 27, 2013

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

BITA GHAJARIEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Ms Bita Ghajarieh, seeks judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *Act*], of the May 16, 2012 decision of an Immigration Officer [the Officer] at the Canadian Embassy in Warsaw, Poland, which determined that she did not meet the requirements for permanent resident status in Canada as a Federal Skilled Worker pursuant to subsection 76(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the *Regulations*].

Background

[2] Ms Ghajarieh is a citizen of Iran who applied for permanent residence as a member of the Federal Skilled Worker [FSW] class, under National Occupational Classification [NOC] 1111, Financial Auditors and Accountants. The Officer assessed her application and attributed 66 points, falling one point below the minimum 67 point requirement for eligibility in the FSW class.

[3] In assessing the application the Officer attributed points for various criteria, including 20 points for the applicant's educational qualifications which recognized one Bachelor's degree and 14 years of study. The applicant had submitted in her application that 22 points should be awarded due to her Bachelor's Degree in Physics and her Associate Degree Diploma in Financial Accounting.

The issues

[4] The two determinative issues are the Officer's assessment of the applicant's educational credentials pursuant to subsection 78(2), and the application of subsection 76(3) of the *Regulations* which permits an Officer to exercise discretion to evaluate the likelihood of the ability of the skilled worker to become economically established in Canada where the assessment of points is not a sufficient indicator.

[5] The applicant provided evidence that she obtained a Bachelor's degree in Physics in 1998, which was a five year program, and she had obtained an Associate Degree Diploma in Financial Accounting in 2008, which was a two year program. The applicant submits that the courses for the Associate Degree were the same courses taken by those in a Bachelor Degree program.

[6] The applicant submits that the Officer breached procedural fairness by fettering his discretion in the assessment of the applicant's educational credentials by failing to look beyond the title of her second degree to determine its equivalence as a bachelor's level degree.

[7] The applicant argues that this is an overly rigid approach in light of Citizenship and Immigration Canada's [CIC] Operational Manual, *OP 6A Federal Skilled Workers* [OP 6A], which states that "Officers should assess programs of study and award points based on the standards that exist in the country of study". The term "bachelor's level" is not defined in the *Act* or *Regulations*, and therefore the Officer had a duty to look beyond the title of the degree and assess it according to standards in the country of study.

[8] The applicant also submits that the Officer erred in not exercising his discretion pursuant to subsection 76(3) to substitute the point assessment with an evaluation of the applicant's likelihood of becoming economically established in Canada. The applicant submits that although she did not specifically refer to subsection 76(3) in her request for a reassessment of the points attributed, it was implied by the specific wording of the letter submitted by her representative which began with "in consideration of the above [facts] and in the name of humanity, we kindly ask that our client be accepted as she will meet the requirements by obtaining the necessary points once the adjustment is made…".

[9] The respondent submits that the applicant failed to discharge the onus upon her to establish her eligibility; she did not provide evidence that her Associate Degree Diploma in Financial Accounting was equivalent to a Bachelor's degree or was at the bachelor's level and therefore did

not provide sufficient evidence to satisfy the Officer that her educational experience warranted 22 points. It was reasonable for the Officer to conclude that the applicant had only one degree at the bachelor's level.

[10] With respect to the issue of the Officer's duty to consider a substituted evaluation pursuant to subsection 76(3), the respondent submits that this is an exceptional discretion that may be exercised where the officer is convinced that the point system does not adequately reflect the applicant's ability to settle in Canada. In the absence of a specific request by the applicant, there is no requirement for the Officer to consider a substituted evaluation. In this case, the letter reiterated that the applicant had two degrees and asked only that the points be re-assessed. It did not request that the officer exercise the special discretion. Whether or not a request was made, the respondent submits that, as indicated by the Officer's reasons, there was no basis on which to exercise the discretion.

Standard of review

[11] The issue of whether the Officer fettered his discretion is an issue of procedural fairness and is reviewable on a standard of correctness: *Singh v Canada (Minister of Citizenship and Immigration)*, 2011 FC 813 at para 9. As explained below, I do not find that the Officer fettered his discretion.

[12] The issue is whether the Officer reasonably determined that the applicant had not met the requirements for eligibility in the FSW class. The Officer is a specialized decision-maker whose factual findings relating to an applicant's eligibility for permanent residence in Canada attract

significant deference and are reviewable on a reasonableness standard: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at para 53; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] at para 59; *Hameed v Canada (Minister of Citizenship and Immigration)*, 2008 FC 271 at para 22.

[13] As noted in *Khosa* and often cited, the role of the Court is to "determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome" (para 59).

Was the Officer's assessment of the applicant's educational credentials reasonable?

[14] The applicant submitted documents to establish that she had a university degree in Physics from Islamic Azad University, awarded in 1998 after five years of study. She also indicated that she received an Associate Degree Diploma in Financial Accounting in 1998 from Scientific Applied Comprehensive University and submitted a document to establish that the diploma had been awarded, as well as transcripts indicating the courses taken and the marks received.

[15] Although the applicant now submits that the Associate Degree Diploma is equivalent to a bachelor's degree, that she took the same classes as students enrolled in the bachelor's program, and that the only distinction between the two was that her program was two instead of three years in

length, the applicant did not provide sufficient supporting evidence for the Officer to establish that this degree was at the bachelor's level.

[16] There is no dispute that the applicant bears the onus to satisfy the Officer that she meets all the requirements under the Federal Skilled Workers Class and to put her "best foot forward" to support the point value she had estimated for her educational credentials (*Singh v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1356 at para 32; *Sharma v Canada (Minister of Citizenship and Immigration)*, 2009 FC 786 at para 8). There is no requirement for the Officer to seek out other information to supplement the application, apart from the guidance provided in OP 6A to consider the credentials in the context of the standards that exist in the country of study.

[17] The applicant takes the position that the Officer fettered his discretion in not looking beyond the title of her Associate Degree Diploma as he should have done to determine the applicable points to be attributed to her educational credentials in accordance subsection 78(2).

[18] That subsection provides:

> 78. (2) A maximum of 25 points shall be awarded for a skilled worker's education as follows:
>
> (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
>
> (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.

[19] The scale recognizes both post-secondary educational credentials that are not university credentials and university credentials. The applicant proposed that her two degrees should result in 22 points, relying on paragraph 76(2)(e)(ii). I note that this paragraph refers only to two or more university credentials at the bachelor's level and does not refer to the length of the course of study as does paragraph 76(2)(d)(ii) which requires a two-year university credential at the bachelor's level. I considered the applicant's argument that the different wording permits a different interpretation, however, in my view, the paragraphs must be read together. Paragraph 76(2)(d)(ii) requires a two-year university educational credential. The reference in paragraph 76(2)(e)(i) to two

or more university educational credentials should logically be interpreted to relate back to those same credentials which refer to a two-year university educational credential at the bachelor's level.

[20] The applicant has focused on how the term "bachelor's level" should be interpreted and whether this has a different meaning from a bachelor's degree and argues that the Officer should have looked beyond the title of the diploma in his assessment.

[21] I note, however, that the applicant and respondent both agreed that a credential means successful completion of the program. The Officer referred to the definition of educational credentials in the *Regulations*, which makes it clear that the program must be completed and a diploma or other credential awarded.

[22] Section 73 of the *Regulation*s provides:

"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 de tels établissements dans le pays de délivrance de ce diplôme ou certificat.

[23] Therefore, the completion of a bachelor's level program should lead to a bachelor's degree.

[24] While some applicants may view the points scale as leaving gaps and not addressing their particular educational credentials, the Officer is obliged to apply the *Regulations* as they are. In this case, the applicant was awarded 20 points only. This reflects her Bachelor's degree in Physics and nothing more. Her two-year diploma, even if it were only considered to be a post-secondary non-university educational credential pursuant to paragraph 78(2)(d)(i), would not result in additional points.

[25] The Officer's letter in response to the request for a reassessment, which forms part of the reasons, indicates that he assessed the degree and concluded that it did not fit within any of the categories of paragraph 78(2):

> Altough [sic] an Associate's degree is considered as an **university degree**, it is **not** the same as a Bachelor's Degree. It is **not** equivalent either to a college diploma, trade certificate or apprenticeship because it is a university degree.
>
> As indicated in R78 (2)e), 22 points should be awarded if an applicant has two or more university educational credentials at the **bachelor's level** and a total of at least 15 years of studies.
>
> Given that an Associate's degree is not at Bachelor's level, a person with one Bachelor's degree and one Associate's degree would not meet the criteria.
>
> (Emphasis in the original)

[26] As noted by Justice Roy in *Sedighi v Canada (Minister of Citizenship and Immigration)*, 2013 FC 445, a case involving the points attributed to the applicant who asserted he was a doctor:

> [15] It was for the applicant to show that the university educational credential he obtained was at the master's or doctoral level, in order to benefit from paragraph 78(2)(*f*) of the Regulations. His contention that, somehow, the officer had an obligation to inform himself of the requirements for a medical degree in Iran is without merit. The burden is not transferred on the shoulders of the decision-

> maker; it remains that of the applicant throughout. The applicant raised one ingenuous argument, based on one word in paragraph 78(2)(*f*): "level". He contends that the use of the word "level" in conjunction with "master's or doctoral" suggests that it is not a particular degree that is required, but a diploma at the equivalent "level". Unfortunately for the ingenuous argument of the applicant, it is not conversant with the French version of the same paragraph, which makes it quite clear that the degree required is one of a second or third cycle of studies. As is well known, courts will seek to find the common meaning between bilingual versions and that shared meaning will be accepted (*Merck Frosst Canada Ltd v Canada (Health)*, [2012] 1 SCR 23). In view of the evidence before the officer, it was not unreasonable to conclude as he did that the degree is not of the master's or doctoral level.

[27] The comparison between the French and English versions of the provisions does not clarify the issue in the present case as the bachelor's level is the "premier cycle" or first level and both degrees of the applicant are submitted to be at that same level. However, as in *Sedighi*, the burden remained on the applicant to establish that her Associate Degree was at the bachelor's level and she did not do so.

[28] The Officer did consider the nature of the Associate Degree Diploma and he concluded that it was not at the bachelor's level. Although the applicant suggests that the Officer failed to assess this credential in the context of the country of study, there is nothing to suggest that the Officer did not do so.

[29] The Officer's assessment of the points to be attributed to the applicant was based on the application of the *Regulations* to the evidence before him. The decision was intelligible, transparent and justified and was within the range of possible acceptable outcomes.

Did the Officer err by not exercising his discretion pursuant to subsection 76(3)?

[30] Subsection 76(3) of the *Regulations* provides:

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.	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) — n'est pas un indicateur suffisant de 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*).

[31] The wording of the provision is clear that the Officer may substitute an assessment of points for other criteria where the points are insufficient to determine whether the applicant can integrate economically in Canada, but there is no requirement to do so.

[32] The jurisprudence supports the clear wording of the subsection.

[33] In *Esguerra v Canada (Minister of Citizenship and Immigration)*, 2008 FC 413, [2008] FCJ No 549, Justice de Montigny noted:

> **16** The discretion under subsection 76(3) of the *IRPR* is clearly exceptional and applies only in cases where the points awarded are not a sufficient indicator of whether the skilled worker will become economically established. The fact that the applicant or even this court would have weighed the factors differently is not a sufficient ground for judicial review.

[34] In *Budhooram v Canada (Minister of Citizenship and Immigration)* 2009 FC 18, [2009] FCJ No 46 [*Budhooram*], Justice Lagacé made similar comments:

> **14** The discretion under subsection 76(3) of the Regulations is clearly exceptional to cases where the points awarded are not a sufficient indicator of whether the skilled worker will become economically established. This decision is entitled to deference and the fact that that the applicant or the Court would have weighed the factors differently is not a ground for judicial review (*Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, paras. 34-39; *Poblano v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1424, 2005 FC 1167, paras. 4-5, 8).

[35] In *Nehme v Canada (Minister of Citizenship and Immigration)*, 2004 FC 64, [2004] FCJ 49, Justice MacKay found that an officer is under no obligation to consider a substituted evaluation and if this discretion is not exercised, the applicant is left with the application of subsection 75(3) if the eligibility requirements are not met:

> **25** In the written submissions provided subsequent to the hearing, the applicant raises yet another new issue and argues that the visa officer should be directed to consider, pursuant to s-s 76(3) of the Immigration and Refugee Protection Regulations ("IRPA Regs."), the likelihood of her ability to become economically established in Canada despite her failure to obtain the required points required for acceptance as a permanent resident in the skilled worker class. In my view, this section gives the visa officer the discretion to consider likelihood of an applicant's ability to become economically established in Canada, but the visa officer is not bound to do so, particularly where no request for such consideration is made with the application. The discretion vested under that provision is for the visa officer, and there is no basis for the Court to order that it be exercised. Thus, unless such exceptional discretion is exercised by the visa officer, the applicant is subject to s-s. 75(3) of the IRPA Regs, which states that the failure to meet the requirements for acceptance as a permanent resident dispenses with any necessity for the visa officer to make any further assessment.

[36] While an officer has discretion to conduct a substituted evaluation on his own initiative, in the absence of a request by the applicant pursuant to subsection 76(3), the officer is not required to do so. As Justice Mosley noted in *Eslamieh v Canada (Minister of Citizenship and Immigration)* 2008 FC 722, [2008] FCJ No 909:

> **4** Visa Officers have the authority to consider an alternative evaluation under subsection 76(3) by their own motion, as held by my colleague Justice Carolyn Layden-Stevenson in *Zheng v. Canada (Minister of Citizenship and Immigration)*, 2002 FTR 1115, 26 Imm. L.R. (3d) 72. That said, it is clear from the jurisprudence that they are under no obligation to exercise that discretion unless specifically requested to do so. The applicant concedes that she did not make such a request and I cannot therefore find that the Visa Officer was unreasonable in her decision.

[37] In the present case, the applicant made no request for a substituted evaluation. The letter sent by the applicant dated May 15, 2012 asked only for a reassessment of the points awarded but did not request a substituted evaluation pursuant to subsection 76(3) of the *Regulations*. It is not possible to interpret the phrase included in the letter, "…in the name of humanity, we kindly ask that our client be accepted as she will meet the requirements by obtaining the necessary points once the adjustment is made", as a "request" pursuant to subsection 76(3) given that the content of the request is focussed on the re-assessment of points for the Associate degree. The expression, "in the name of humanity", appears to be a customary term.

[38] The Officer's decision indicates:

> "You have not obtained sufficient points to satisfy me that you will be able to become economically established in Canada. I am satisfied that the points awarded and the information provided accurately reflect your ability to become economically established in Canada."

[39] As noted by the respondent, the Officer concluded that the points did reflect the ability – or the lack of ability – to become established. Therefore, even if there was an implicit request to consider a substituted evaluation, the Officer found that it would not be warranted because he was satisfied that the points were an accurate measure of the applicant's ability to become economically established, hence subsection 76(3) would not apply.

[40] In *Budhooram* (at paragraph 31), Justice Lagacé addressed a similarly worded decision and noted:

> There is no requirement under the regulations, guidelines or jurisprudence that visa officers give reasons for the refusal to exercise discretion. It is clear however from the CAIPS notes forming part of the file that the Officer was not satisfied that the points were an inaccurate reflection of the applicant's ability to become established.

Conclusion

[41] Although the points attributed to the applicant fell short of the required minimum by only one point, the applicant had the onus to establish to the satisfaction of the Officer that her educational credentials justified a higher point value and she did not meet that onus. The Officer's assessment was reasonable. The Officer was not required to conduct a substituted evaluation even if an explicit request had been made to do so, but which had not been made in this case. Moreover, the Officer's reasons indicate that there was no basis to consider a substituted evaluation.

[42] As a result, I would dismiss the application for judicial review. No question was proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question is certified

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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