Federal Court  Cour fédérale

Date: 20160914

Docket: T-2425-14

Citation: 2016 FC 1040

Ottawa, Ontario, September 14, 2016

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

JUVENAL DA SILVA CABRAL, PEDRO MANUEL GOMES SILVA, ROBERT ZLOTSZ, ROBERTO CARLOS OLIVEIRA SILVA, ROGERIO DE JESUS MARQUES FIGO, JOAO GOMES CARVALHO, ANDRESZ TOMASZ MYRDA, ANTONIO JOAQUIM OLIVEIRA MARTINS, CARLOS ALBERTO LIMA ARAUJO, FERNANDO MEDEIROS CORDEIRO, FILIPE JOSE LARANJEIRO HENRIQUES, ISAAC MANUEL LEITUGA PEREIRA, JOSE FILIPE CUNHA CASANOVA

Plaintiffs

and

MINISTER OF CITIZENSHIP AND IMMIGRATION, MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND HER MAJESTY THE QUEEN

Defendants

ORDER AND REASONS

Introduction

[1] The Defendants move for summary judgment. They ask the Court to dismiss the action, with costs.

[2] The essentials of the Plaintiffs' claim, as reflected in the Amended Statement of Claim is as follows:

(a) Each of the Plaintiffs applied for permanent resident status pursuant to subsection 12(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 and section 87.2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, as part of the Federal Skilled Trade Class [FSTC];

(b) Despite meeting all of the other requirements for permanent residence required by the FSTC, each was refused because he failed to meet the language requirement by failing the International English Language Testing System [IELTS], adopted by the Minister of Citizenship and Immigration;

(c) The Plaintiffs allege that the IELTS is culturally biased towards "British English" rather than "Canadian English" and unfairly requires a high proficiency in English;

(d) The Plaintiffs further allege that the Minister administers the FSTC in a manner that favours persons from English-speaking countries and discriminates against those, like the Plaintiffs, who are from non-English speaking countries;

(e) Each Plaintiff, having failed to meet the threshold requirements under the IELTS, requested that the officer perform a substitute evaluation of his ability to become economically established in Canada, as provided by subsection 87.2(4) of the Regulations;

(f) The Plaintiffs allege that the officer refused to consider their applications on the merits because of a Ministerial Instruction stipulating that no FTSC application was to be examined by an officer unless the language requirement was met;

(g) The Plaintiffs allege that the Ministerial Instruction is contrary to the Regulations and is *ultra vires*;

(h) The Plaintiffs allege that the conduct of the Defendants amounts to breach of statute, public misfeasance and abuse, excess of jurisdiction and authority, abuse of process, bad faith, and breach of section 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11; and

(i) The Plaintiffs suffered damages as a result of the Defendants' wrongful conduct.

[3] The Defence filed by the Defendants may be summarized as the following:

(a) Only three Plaintiffs, Mr. Henriques, Mr. Cabral and Mr. Casanova, have standing to bring the action as framed as they applied for permanent residence under the FSTP program and were denied for failing the language test;

(b) The other Plaintiffs either applied under a different program, did not submit an eligible occupation, did not submit other requirements documents, did not have a valid work permit, or submitted expired language test results;

(c) None of the applications were eligible for substituted evaluation because substituted evaluation only comes into play when an application has been reviewed for completeness and eligible for processing, and none of the applications were complete;

(d) The IELTS is not biased and does not require a high proficiency in English;

(e) The Plaintiffs have the choice between two different language tests and if they fail their chosen test, they may retake it as many times as they wish, or take the other approved test; and

(f) The Ministerial Instruction is delegated legislation, enacted pursuant to subsection 87.3(3) of the Act which gives the Minister the ability to issue instructions with respect to the processing of applications such as FSTC applications.

Evidence Filed

[4] The Defendants filed three affidavits and their attached exhibits in support of the motion. As a preliminary matter, the Plaintiffs submit that none of these affidavits are admissible. Each affiant was cross-examined by counsel for the Plaintiffs and the transcripts put before the Court.

[5] The Plaintiffs object to these affidavits because they "are sworn without any personal knowledge of the applications of the Plaintiffs or other facts in issue in the within action," they "were not the decision-makers who decided not to process the Plaintiffs' applications," and they "did not issue the reasons or letters for the decision(s) in respect of the Plaintiffs' applications, if reasons exist." The Plaintiffs complain that by putting evidence forward through these witnesses, they have been denied the right to cross-examine the relevant individual decision-

makers, that there is no evidence put before the Court by the Minister, and lastly they submit that the affidavits at issue "largely consist of opinions on the law, which is the purview of the Court."

[6] The starting point is Rule 81(1) of the *Federal Courts Rules*, SOR/98-106: "Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included."

[7] The Defendants' first affiant, Ms. Williams, is a Program Support Officer at the Department of Immigration, Refugee and Citizenship Canada, (formerly Citizenship and Immigration Canada) where her main duties include reviewing and assessing applications for permanent residence under the economic class under the provincial nominee program. She previously reviewed and assessed a number of different types of applications for eligibility under the economic class under the federal skilled worker program, Canadian experience class, and FSTC.

[8] At paragraph 5 of her affidavit she attests that her affidavit is "directed towards setting out the operation of the FSTP [Federal Skilled Trades Program], the processing of applications submitted as part of the FSTP, and information regarding the Plaintiffs' applications." I find that to be an accurate summary of her evidence.

[9] I accept, given her position and background, that she has personal knowledge of the FSTP and the processing of applications under it. Her knowledge of the Plaintiffs' applications

(paragraphs 36-78 of her affidavit) is based on her review of the Global Case Management System [GCMS] notes. She attests that GCMS is an electronic file system used by Immigration, Refugees and Citizenship Canada for the processing of applications for admission to Canada.

[10] I find that, given her position, she can speak to the creation of the GCMS notes and the fact that they reflect various officers' assessments and decisions involving the applications at issue. The GCMS notes are business records of the Minister and his officials and an exception to the hearsay rule. It was not necessary, as the Plaintiffs submit, that each of the officers making the various decisions tender an affidavit. On the other hand, Ms. Williams has no direct knowledge of the applications or the officers' decisions, other than as is reflected in the GCMS notes. Accordingly, her evidence, and the evidence from the GCMS notes may be contradicted by direct evidence tendered by the Plaintiffs. I note that the cover letters returning the FSTC applications, without exception, reflect the description for rejection in the GCMS notes.

[11] Ms. Williams attests in many instances that there were reasons for rejecting a Plaintiff's application other than those outlined in the GCMS notes and cover letter, such as failure to have a work permit. On cross-examination, she admitted that she could not challenge any statement made by Richard Boraks, the Plaintiffs' affiant, when he contradicts her, because she had no personal knowledge of the applications. Mr. Boraks is the lawyer who prepared 26 of the 27 applications under the FSTP for the 13 Plaintiffs. I accept that he has personal knowledge of the applications and the determinations made by the Minister's officials as were reported to him. Given this admission, and the fact that Mr. Boraks does have personal knowledge of the applications because he prepared them, his evidence is preferred. In the summary of the

applications set out below, I have excluded from consideration any statement made by Ms. Williams that is contradicted by Mr. Boraks.

[12] I do not find that Ms. Williams' affidavit speaks to the law, as alleged by the Plaintiffs. Her references to subsection 87.2(3) of the Regulations are incidental, and do not seek to interpret the meaning of the provision. I therefore conclude that her affidavit is admissible.

[13] I apply the same reasoning to Ms. Tyler's affidavit. Ms. Tyler is the Assistant Director of the Economic Policy and Programs Division at the Department of Immigration, Refugee and Citizenship Canada. She supervises a team of analysts responsible for developing the FSTC and the language testing policies for economic immigration. In her affidavit, she attests to the creation of the FSTC, the legislative requirements of the FSTC, the language requirements of the FSTC and the content of the Ministerial instructions on the FSTC. She did not engage in the interpretation of the law, but simply listed the legislative requirements as they appear in the legislation. I therefore conclude that her affidavit is also admissible.

[14] Alana Homeward is a paralegal in the Ontario Office of the Department of Justice assisting counsel for the Defendants in this matter. The majority of her affidavit speaks to Minister Kenney's trips to England and Ireland between 2012 and 2014 to announce and promote the FSTP and to invite workers to come to Canada. She attaches a number of exhibits consisting of news releases, the Minister's speaking notes and talking points, news articles, and the like. She admitted on cross-examination that she could not speak to the truth of the contents of any of these exhibits. I accept that she can attest that these documents were generated as they

purport to have been; however, the probative value of the documents she attaches to her affidavit is slight, given her admission.

[15] The Plaintiffs' affiant, Mr. Boraks, attaches the first page of each application but not the full contents "given their inordinate volume." Given the nature of the motion and the obligation that each party puts its best case forward, he ought to have included the entire application, regardless of volume. He also attaches as exhibits the acknowledgement of receipt and in some instances, the details for the rejection of the application.

[16] His affidavit speaks to a number of matters and allegations that go well outside the pleading in this action. These include issues such as the funding of the FSTP by the government, the refusal to process applications that were incomplete in only minor respects, refusing applicants to correct minor incompleteness concerns, and the language abilities of the Plaintiffs as evidenced by the fact that they had worked in Canada for many years and had satisfied union and provincial requirements in this regard.

Federal Skilled Trades Class Application Requirements

[17] There are a number of programs in Canada under which persons may immigrate to and seek permanent residence in Canada. This action deals only with the FSTC program.

[18] The FSTC application is restricted to those who work in and make an application with respect to one of the skilled trade occupations listed in the National Occupational Classification [NOC] identified in subsection 87.2(1) of the Regulations.

[19] Subsection 87.2(3) of the Regulations, attached as Appendix A, sets out the other requirements that must be met for an applicant to be a member of the FSTC. They may be briefly summarized, as follows. An applicant must:

(a) Meet the minimum language proficiency set by the Minister under subsection 74(3) of the Regulations in reading, writing, listening, and speaking;

(b) Have acquired at least two years of full-time experience (or the part-time equivalent) in the skilled trade during the five years preceding the application, after becoming qualified to independently practice in the occupation;

(c) Have met the relevant employment requirements of their skilled trade as specified in the NOC, except for the requirement to obtain a provincial certificate of qualification; and

(d) Have a certificate of qualification issued by a competent provincial authority in the applicant's skilled trade, or a work permit or offer of employment as described in paragraphs 87.2(3)(d)(ii) - (v) of the Regulations.

[20] As noted, each Plaintiff alleges that his FSTC application was denied only because of failing to meet the language requirement set out in (a) above. Subsection 87.2(4) of the Regulations provides for the possibility of a substituted evaluation where the requirements detailed in subsection 87.2(3) of the Regulations are not sufficient indicators of whether an applicant will be able to become economically established in Canada. It provides:

> If the requirements referred to in subsection (3), whether or not they are met, are not sufficient indicators of whether the foreign national will become economically established in Canada, an officer may substitute their evaluation for the requirements. This decision requires the concurrence of another officer.

[21] Each of the Plaintiffs in his application asked the officer to conduct a substitute evaluation regarding the language requirement. No substitute evaluation was conducted for any of the Plaintiffs where their application failed to meet the language requirements.

[22] There are three other matters related to the language requirement relevant to this action.

[23] First, the Defendants have designated two agencies, which administer two different tests, for English-language testing under paragraph 87.2(3)(a) of the Regulations: (1) Paragon Testing Enterprises Inc. which administers the Canadian English Proficiency Index Program-General test [CELPIP], and (2) Cambridge ESOL, IDP Australia, and the British Council, which administer the International English Language Testing System [IELTS]. Each of the Plaintiffs who submitted test results were tested using the IELTS test.

[24] Second, Ministerial Instruction 6 [MI6] dated December 29, 2012, and Ministerial Instruction 12 [MI12] dated April 26, 2014, both provide that "test results must be less than two years old on the date on which the application is received."

[25] Third, the two Ministerial Instructions directed that only those FSTC applicants who had met the language requirements would be processed. By virtue of this direction, an applicant who met all of the other requirements under the FSTC would not have his application processed, or a substituted evaluation considered, if he did not meet the minimum language thresholds that had been established.

[26] This requirement was outlined in two Ministerial Instructions. MI6, which came into force coincident with the creation of the FSTC on January 2, 2013, set a cap of FSTC applications to be processed yearly and within that set a cap for certain identified occupations. MI6 provided that applicants, who met the language threshold and did not exceed the identified cap, would be placed into processing if they met certain specified requirements. It stated that those applications that did not meet these criteria were to be returned as they did not qualify for processing:

> Complete applications from skilled tradespersons received by the Centralized Intake Office in Sydney, Nova Scotia, on or after January 2, 2013, whose applicants meet the language threshold for the Federal Skilled Trades Class as set by the Minister pursuant to subsection 74(1) of the *Immigration and Refugee Protection Regulations*, in each of the four language abilities (speaking, reading, writing and oral comprehension), and that do not exceed the identified caps, shall be placed into processing if they,
>
> (1) as per the 2011 version of the National Occupational Classification (NOC), show evidence of at least two years (24 months) of full-time or equivalent part-time paid work experience, acquired in the last five years, in one of the eligible skilled trade occupations (see footnote 2) in either Group A or B, set out below:
>
> … [emphasis added and footnotes omitted]

[27] MI12, which came into force on May 1, 2014, contained similar language to MI6 in that it too provided that applications, whose applicants met the language threshold for the FSTC and did not exceed the cap, would be placed into processing. Those that did not would be returned to the applicant with the advice that their application did not qualify for processing.

Evidence Regarding Each Plaintiff's FSTC Application(s)

[28] The record before the Court on this motion shows the following with respect to each Plaintiff. Some made more than one FSTC application.

Juvenal Da Silva Cabral

[29] Mr. Da Silva Cabral submitted three FSTC applications.

[30] Mr. Da Silva Cabral's first application was submitted on March 15, 2013 [FSTC Application 01]. The GCMS notes indicate that it was returned because Mr. Da Silva Cabral's English language test was older than two years, and he did not meet the language requirements for writing, speaking and listening.

[31] Mr. Da Silva Cabral's second application was submitted November 29, 2013 [FSTC Application 02]. The GCMS notes indicate that it was returned because Mr. Da Silva Cabral did not meet the language test results for listening and writing.

[32] Mr. Da Silva Cabral's third application was submitted December 29, 2014 [FSTC Application 03]. The GCMS notes and cover letter indicate that it was returned because Mr. Da Silva Cabral did not meet the language test results for listening and writing, the incorrect fee was received as a previously dependent child was no longer a dependent, and the additional family forms he submitted were outdated as they were signed and dated in 2013.

Pedro Manuel Gomes Silva

[33] Mr. Gomes Silva submitted two FSTC applications.

[34] Mr. Gomes Silva's first application was submitted on August 12, 2013 [FSTC Application 04]. The GCMS notes and the cover letter indicate that it was returned because Mr. Gomes Silva's English language test was older than two years, and he did not meet the language requirements for speaking and listening.

[35] Mr. Gomes Silva's second application was submitted December 25, 2015 [FSTC Application 05]. The GCMS notes and cover letter indicate that it was returned because Mr. Gomes Silva's language test was older than two years. The GCMS notes also indicate that he did not meet the language requirements for speaking and listening.

Robert Zlotsz

[36] Mr. Zlostz submitted two FSTC applications.

[37] Mr. Zlostz's first application was submitted on September 17, 2013 [FSTC Application 06]. The GCMS notes and the cover letter indicate that it was returned because Mr. Zlostz applied under an ineligible NOC.

[38] Mr. Zlostz's second application was submitted December 29, 2014 [FSTC Application 07]. The GCMS notes and cover letter indicate that it was returned because Mr. Zlostz's language test was older than two years.

Roberto Carlos Oliveira Silva

[39] Mr. Oliveira Silva submitted two FSTC applications.

[40] Mr. Oliveira Silva's first application was submitted on September 3, 2013 [FSTC Application 08]. The GCMS notes and the cover letter indicate that it was returned because Mr. Oliveira Silva did not meet the language requirements for writing and speaking. The cover letter also indicates that he failed to include the appropriate NOC code for his specified work experience.

[41] Mr. Oliveira Silva's second application was submitted on July 25, 2014 [FSTC Application 09]. The GSMS notes indicate that it was approved and Mr. Oliveira Silva was granted permanent residence status on April 12, 2015. Mr. Boraks attests that this application was not made under the FSTC program but under the Canadian Experience Class program. Either way, this application is irrelevant. Either it was approved under the FSTC or it was not under the FSTC. Under either scenario, it is not relevant to this action as framed.

Rogerio De Jesus Marques Figo

[42] Mr. Marques Figo submitted two FSTC applications.

[43] Mr. Marques Figo's first application was submitted on December 29, 2014 [FSTC Application 10]. The GCMS notes and the cover letter indicate that it was returned because Mr. Marques Figo did not meet the language requirements for reading, writing, speaking, and listening and because the attached Schedule 11 and family information forms were signed over one year prior to the application.

[44] Mr. Marques Figo's second application was submitted on March 7, 2016 [FSTC Application 11]. The GCMS notes and cover letter indicate that it was returned because of a moratorium on the twelfth set of Ministerial Instructions as of January 1, 2015. As a result applications under FSTC were to be sent through Express Entry. The GCMS notes do not indicate that he ever made an application under the Express Entry.

Joao Gomes Carvalho

[45] Mr. Gomes Carvalho submitted two FTSC applications.

[46] Mr. Gomes Carvalho's first application was submitted on October 14, 2014 [FSTC Application 12]. The GCMS notes and the cover letter indicate that it was returned because Mr. Gomes Carvalho did not meet the language requirements for reading, writing, speaking, and listening.

[47] Mr. Gomes Carvalho's second application was submitted on December 29, 2014 [FSTC Application 13]. The GCMS notes and cover letter indicate that it was returned because Mr. Gomes Carvalho did not meet the language requirements for reading, writing, speaking, and listening.

Andresz Tomasz Myrda

[48] Mr. Mydra submitted three FSTC applications.

[49] Mr. Mydra's first application was submitted on August 29, 2013[FSTC Application 14]. The GCMS notes and the cover letter indicate that it was returned because Mr. Mydra submitted it under an inapplicable NOC code. Mr. Boraks disputes this.

[50] Mr. Mydra's second application was submitted on January 3, 2014 [FSTC Application 15]. The GCMS notes indicate that it was returned because Mr. Mydra's language test was older than two years.

[51] Mr. Mydra's third application was submitted on December 29, 2014 [FSTC Application 16]. The GCMS notes and cover letter indicate that it was returned because Mr. Mydra's language test was older than two years and he did not submit a supplementary travel form for himself and his wife. Mr. Boraks attests that the travel forms were submitted.

Antonio Joaquim Oliveira Martins

[52] Mr. Oliveira Martins submitted two FSTC applications.

[53] Mr. Oliveira Martins' first application was submitted on January 14, 2014 [FSTC Application 17]. The GCMS notes and the cover letter indicate that it was returned because Mr. Oliveira Martins did not submit language test results, proof of studies or fees for one of his children, a Schedule A for another child, and did not include the NOC code. Mr. Boraks attests that he did submit "the child dependant information referred to in Ms. Williams' affidavit."

[54] Mr. Oliveira Martins' second application was submitted on December 29, 2014 [FSTC Application 18]. The GCMS notes indicate that it was returned because Mr. Oliveira Martin did not submit language test results and he was listed as a dependant person older than 19.

Carlos Alberto Lima Araujo

[55] Mr. Lima Araujo submitted one FSTC application.

[56] Mr. Lima Araujo's application was submitted on December 29, 2014 [FSTC Application 19]. The GCMS notes and the cover letter indicate that it was returned because Mr. Lima Araujo submitted language test results that were older than two years, and did not submit birth certificates for himself, his spouse and his two dependents. Mr. Boraks attests that the birth certificates were included with the application.

Fernando Medeiros Cordeiro

[57] Mr. Medeiros Cordeiro submitted two FSTC applications.

[58] Mr. Medeiros Cordeiro's first application was submitted on May 21, 2013 [FSTC Application 20]. The GCMS notes indicate that it was returned because it was significantly incomplete.

[59] Mr. Medeiros Cordeiro's second application was submitted on December 29, 2014 [FSTC Application 21]. The GCMS notes and cover letter indicate that it was returned because

Mr. Medeiros Cordeiro did not submit language test results, an offer of employment or if employed a labour market opinion, a work permit, or a certificate of qualification.

Filipe Jose Laranjeiro Henriques

[60] Mr. Laranjeiro Henriques submitted two FSTC applications.

[61] Mr. Laranjeiro Henriques' first application was submitted on November 25, 2013 [FSTC Application 22]. The GCMS notes and the cover letter indicate that it was returned because Mr. Laranjeiro Henriques did not meet the language test results for listening.

[62] Mr. Laranjeiro Henriques' second application was submitted on December 24, 2014 [FSTC Application 23]. The GCMS notes and cover letter indicate that it was returned because Mr. Laranjeiro Henriques did not meet the language test result for reading and listening. He was also asked to update Schedules A and 11 as they were stale-dated.

Isaac Manuel Leituga Pereira

[63] Mr. Leituga Pereira submitted one FSTC application.

[64] Mr. Leituga Pereira's application was submitted on December 29, 2014 [FSTC Application 24]. The GCMS notes and the cover letter indicate that it was returned because Mr. Leituga Pereira did not meet the language requirements in reading, writing, speaking, and listening and he was required to submit additional family information on his spouse.

Jose Filipe Cunha Casanova

[65] Mr. Cunha Casanova submitted three FSTC applications.

[66] Mr. Cunha Casanova's first application was submitted on November 29, 2013 [FSTC Application 25]. The GCMS notes and the cover letter indicate that it was returned because Mr. Cunha Casanova did not meet the language requirements in reading, writing, speaking, and listening.

[67] Mr. Cunha Casanova's second application was submitted on May 15, 2014 [FSTC Application 26]. The GCMS notes and the cover letter indicate that it was returned because Mr. Cunha Casanova did not meet the language requirements in reading, writing, speaking, and listening.

[68] Mr. Cunha Casanova's third application was submitted on December 29, 2014 [FSTC Application 27]. The GCMS notes and the cover letter indicate that it was returned because Mr. Cunha Casanova did not meet the language requirements in reading, writing, speaking, and listening, and his language test results were older than two years.

Summary Judgment

[69] Rules 213-219 of the *Federal Courts Rules* govern summary judgment. Rule 215(1) provides that if on motion "the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly." This Court has held that in determining whether there is a genuine issue for trial the judge is entitled to assume that that parties have put their best foot forward, and that if the action were to go to trial,

no additional evidence would be presented: *The Rude Native Inc v Tyrone T Resto Lounge*, 2010 FC 1278 at para 16, 195 ACWS (3d) 1128. The Rules impose a burden on the moving party to establish on the balance of probabilities that there is no genuine issue for trial, but they also impose a burden on the responding party to set out specific facts and adduce evidence showing that there is a genuine issue for trial.

Analysis of Issues for Trial

[70] At the commencement of the oral hearing, counsel for the Plaintiffs objected to tying his clients' case to the pleadings, rather than the evidence. If by this he meant that it was open to this Court when determining this motion to assess whether there was evidence of a triable dispute beyond the pleading, I disagree. The test on a summary judgment motion is whether there is a genuine issue for trial, and the issues to be examined are those framed by the pleadings. It is not for the Court to make a party's case nor to seek triable issues outside the four corners of the pleadings the parties have filed.

Refused Only Because of the Language Test Result

[71] It is fundamental to the Plaintiffs' claim that each had his application refused only because he failed to meet the minimum language test requirements, but had met all other requirements under the FSTC program. Accordingly, as the Defendants submit, if an application did not meet all of the other requirements, it cannot found a basis for the claim.

[72] There can be no genuine issue for trial with respect to any FSTC application that was not filed with respect to one of the NOC identified in subsection 87.2 of the Regulations. Failure to meet this fundamental requirement would mean that the application could not succeed, even if all of the other requirements were met. FSTC Applications 06, 08, and 17 were returned and failed to identify any NOC code or identified one that was not part of the FSTC program. Accordingly, no genuine issue for trial can be shown with respect to any of these applications.

[73] There can be no genuine issue for trial with respect to any FSTC application that was incomplete or provided stale-dated information, except for language test requirements, because any such application would necessarily have to be rejected. FSTC Applications 03, 10, 18, 20, 21, 23, and 24 were either incomplete or contained stale-dated information and would have been rejected even if the language test results were acceptable. Accordingly, no genuine issue for trial can be shown with respect to any of these applications.

[74] There can be no genuine issue for trial with respect to any FSTC application that was submitted after January 1, 2015, when a moratorium was put in place and applications had to be sent through Express Entry. FSTC Application 11 fell into this category. Accordingly, no genuine issue for trial can be shown with respect to that application.

[75] The Plaintiffs challenge the validity of the Ministerial Instruction that requires that an applicant must meet the language thresholds thus making no substituted evaluation possible with respect to this criterion. They have not challenged the aspect of the instruction that requires that the test results be current within the previous two years. FSTC Applications 01, 04, 05, 07, 15,

16, 19, and 27 each included stale test results and accordingly would have been returned in any event. Accordingly, no genuine issue for trial can be shown with respect to these applications.

[76] The remaining applications, FSTC Applications 02, 12, 13, 14, 22, 25, and 26 were rejected because each applicant failed to meet the threshold language requirements. *Prima facie*, a genuine issue for trial can be shown for these applications because they were rejected only on the basis of the language requirement.

[77] These remaining applications, exclude the following Plaintiffs: Mr. Pedro Gomes Silva, Mr. Robert Zlostz, Mr. Roberto Oliveira Silva, Mr. Rogerio Marques Figo, Mr. Andresz Mydra, Mr. Antonio Oliveira Martins, Mr. Carlos Lima Araujo, Mr. Fernando Medeiros Cordeiro, and Mr. Isaac Leituga Pereira. There is no genuine issue for trial with respect to the claims advanced by these nine Plaintiffs and judgment must issue dismissing their claims.

[78] In considering whether there is a genuine issue for trial with respect to the FSTC applications of the remaining Plaintiffs, I now turn to the allegations regarding the use of the IELTS test, the Ministerial Instruction, and the failure to conduct a substitute evaluation.

Minimum Language Proficiency

[79] Subsection 74(2) of the Regulations provides that the “minimum language proficiency thresholds fixed by the Minister shall be established with reference to the benchmarks described in the *Canadian Language Benchmarks* and the *Niveaux de compétence linguistique canadiens*."

[80] The Plaintiffs admit at paragraph 12 of their Amended Statement of Claim that "the Minister is entitled to delegate the administering of the [language] test to an outside body." As noted earlier, the Minister has delegated this vis-à-vis the English test to two outside bodies, which each administers its own test. The Plaintiffs complain only of the inappropriateness of the IELTS test but make no similar claim regarding the CELPIP test used by the other body delegated by the Minister.

[81] I accept the submission of the Defendants that there is no prohibition on the number of times an applicant may take a language test, that each applicant may choose which of the two English-language tests he wishes to take, and that an applicant may take both tests.

The IELTS Test

[82] The Plaintiffs allege that the IELTS is culturally biased towards "British English" and unfairly requires a high proficiency in English.

[83] The Language Benchmarks established for the FSTC are as follows: Reading 4.0, Listening 5.0, Writing 4.0, and Speaking 5.0. Ms. Tyler in her affidavit provides the only evidence on this motion as to the meaning of these benchmarks. She attests that a score of 4 amounts to "fluent basic ability" and a score of 5 amounts to "initial intermediate ability."

[84] In the context of the FSTC application these benchmarks require the following:

- Reading: "the ability to understand simple social messages; short simple instructions; and the purpose, main idea and key information in simple, short texts."

- Writing: “the ability to ‘write short, simple texts about personal experience and familiar topics or situations related to daily life and experience’.”

- Speaking: “the ability to ‘communicate with some effort in short, routine social situations, and present concrete information about needs and familiar topics of personal relevance’.”

- Listening: “the ability to ‘understand, with some effort, the gist of moderately complex, concrete formal and informal communication’.”

[85] Given this description of the minimum language requirements and the fact that a benchmark of only 4 or 5 is required on a 12 point scale, and absent any evidence from the Plaintiffs to the contrary, the Court cannot conclude that the IELTS requires a “high proficiency” in English, as is alleged in the Amended Statement of Claim.

[86] If the IELTS is culturally biased, as alleged in the Amended Statement of Claim, one would expect to see that English-speaking persons would do significantly better on the tests than persons, like the Plaintiffs, from Italy, Poland, and Portugal. However, the evidence presented by Ms. Tyler does not show that. A chart she attaches as an exhibit showing the 2013 IELTS scoring shows the mean scores by first language:

	Listening	Reading	Writing	Speaking	Overall
English	7.2	6.8	6.9	7.6	7.2
Italian	6.1	6.1	5.8	6.3	6.2

Polish	6.4	6.2	5.9	6.5	6.3
Portuguese	6.4	6.3	6.1	6.7	6.4

[87] Perhaps more telling is the band score by percentage:

	<4	4	4.5	5	5.5	6	6.5	7	7.5	8	8.5	9
English	0	1	1	3	6	10	13	15	16	16	15	5
Italian	1	3	4	11	17	18	15	12	10	6	2	0
Polish	3	3	5	8	12	14	16	15	13	9	3	0
Portuguese	1	2	4	7	12	16	17	15	13	9	3	0

[88] This last chart shows that very few persons tested whose mother tongue was not English failed to meet the minimum score of 4 or 5. Only 1% of Italian speakers scored less than 4 and only 8% scored less than 5; only 3% of Polish speakers scored less than 4 and only 11% scored less than 5; and only 1% of Portuguese speakers scored less than 4 and only 7% scored less than 5. This shows that the vast majority of test-takers of Italian, Polish, and Portuguese background passed the benchmark required by the Defendants.

[89] In my view, the Plaintiffs have not shown that the IETLS is in any manner "unfair" to them based on their background. In particular, given the high test results of persons from Italy, Poland, and Portugal, it cannot be said that the test discriminates against persons from non-English speaking countries. While it is true that a greater percentage of English-speaking candidates pass the benchmarks than non-English-speaking applicants, this can hardly be

surprising and more importantly does not in itself establish that there is a bias against non-English speaking applicants.

Ministerial Instructions

[90] The Plaintiffs argue that the Ministerial Instructions requiring officers to consider only applications where the language benchmark had been met, were contrary to the Regulations. That allegation cannot succeed. As noted above, subsection 87.3(3) of the Act specifically empowers the Minister to issue instructions.

[91] It is also pled that the instructions are *ultra vires* on the basis that they are counter to the express power granted to an officer to make a substituted evaluation pursuant to subsection 87.2(4) of the Regulations.

[92] I agree with the Defendants' submission that "delegated or subordinate legislation is presumed to work together" and that the "interpretation that favours coherence will be adopted over an interpretation that generates conflict."

[93] The Plaintiffs allege that the Minister in instructing officials not to process an application that fails to meet the language thresholds is acting contrary to subsection 87.2(4) of the Regulations which provides for the possibility of a substituted evaluation. They allege at paragraph 16 of their Amended Statement of Claim:

> The Plaintiffs state that, the Defendant Minister of Immigration, in directing his officers not to open or look at a file under the Federal Skilled Trade Class application under s.87.2(4) of the Regulations, notwithstanding that all the Plaintiffs, through their counsel, had

> requested substituted evaluation, is knowingly acting contrary to s. 87.2(4) of the Regulations and s.12(2) of the IRPA itself, and is blatantly contravening his clear statutory duty to process, under s 3(1)(f), of the IRPA, with respect these applications with the result that the Plaintiffs have suffered damages, and continue to suffer damages. [emphasis in original deleted]

[94] The Plaintiffs have failed to convince me that there is a genuine issue for trial with respect to this allegation.

[95] First, subsection 12(2) of the Act provides only that a "foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada" [emphasis added]. Accordingly, even if the Plaintiffs can establish their ability to become economically established in Canada that does not give them a right to be selected. That remains discretionary: there is no obligation or requirement on the Minister to select them.

[96] Second, paragraph 3(1)(f) of the Act which sets out its objectives provides that one such objective is "to work in cooperation with the provinces to secure better recognition of the foreign credentials of permanent residents and their more rapid integration into society." The Plaintiffs have failed to plead any material fact that would support their claim that in issuing his instructions to process only those applications that meet the minimum language thresholds the Minister has breached this objective of the Act. Indeed it is arguable that the instruction that an applicant must meet the language requirement ensures that an applicant will be integrated more rapidly into Canadian society and thus is fully consistent with this purpose.

[97] The Plaintiffs further allege that the Ministerial Instructions are in conflict with the Regulation that provides for substitute evaluation of applications.

[98] In my view, there is no obvious conflict between these two provisions. Ministerial instructions are issued by the Minister under subsection 87.3(3) of the Act relating to the processing of FSTC applications to "best support the attainment of the immigration goals established by the Government of Canada" [emphasis added]. This is a far different and much broader goal than that which permits substituted evaluation. Subsection 87.2(4) of the Regulations makes it clear that substitute evaluation is directed to whether the applicant "will become economically established in Canada" [emphasis added].

[99] Aside from different goals or purposes, the Ministerial Instruction does not nullify the possibility of possible substitute evaluation, because that option remains available if an application fails to meet any of the other requirements.

Loss or Damage Suffered

[100] The Plaintiffs plead that they have suffered damages or loss as a result of the Defendants' actions. They must show that any loss is a direct result of the actions of the Defendants and that they could not avoid or mitigate that loss.

[101] In my opinion, even if the Plaintiffs can establish that the IELTS is a higher standard than the Canadian Language Benchmark, as is alleged in paragraph 13 of their pleading, and even if

they can establish that their IELTS results caused them damage or loss, they failed to mitigate their damage or loss because they failed to take the CELPIP test.

[102] There is no allegation that the CELPIP test was inappropriate, or too high a standard, or focused on "British English" rather than "Canadian English" as is alleged regarding the IELTS. Even if the IELTS results could be said to have caused them loss or damage, they failed to mitigate that loss or damage by taking the CELPIP test. They have not shown that their language abilities would not have met the threshold under that test.

Costs

[103] This claim is a proposed class proceeding. Rule 334.39(1) of the *Federal Courts Rules* provides that no costs are to be awarded in a class proceeding, except in the circumstances set out in paragraphs 334.39(1)(a)–(c). In *Paradis Honey Ltd v Canada*, 2014 FC 215 at para 122, the Court held that a motion to strike a statement of claim brought before the action has been certified, does not engage the class action rules and, in particular, the provision of Rule 334.39. The Defendants being successful are entitled to their costs.

ORDER

THIS COURT ORDERS that the Defendants' motion for summary judgment is granted, and this action is dismissed with costs to the Defendants.

"Russel W. Zinn"
Judge

Appendix "A"

Federal Skilled Trades Class	Travailleurs de métiers spécialisés (fédéral)
Member of class	Qualité
87.2(3) A foreign national is a member of the federal skilled trades class if	87.2(3) Fait partie de la catégorie des travailleurs de métiers spécialisés (fédéral) l'étranger qui :
(a) following an evaluation by an organization or institution designated under subsection 74(3), they meet the threshold fixed by the Minister under subsection 74(1) for proficiency in either English or French for each of the four language skill areas;	a) a fait évaluer sa compétence en français ou en anglais par une institution ou organisation désignée en vertu du paragraphe 74(3) et qui a obtenu, pour chacune des quatre habiletés langagières, le niveau de compétence établi par le ministre en vertu du paragraphe 74(1);
(b) they have, during the five years before the date on which their permanent resident visa application is made, acquired at least two years of full-time work experience, or the equivalent in part-time work, in the skilled trade occupation specified in the application after becoming qualified to independently practice the occupation, and during that period of employment has performed	b) a accumulé, au cours des cinq années qui ont précédé la date de présentation de sa demande de visa de résident permanent, au moins deux années d'expérience de travail à temps plein ou l'équivalent temps plein pour un travail à temps partiel dans le métier spécialisé visé par sa demande après qu'il se soit qualifié pour pratiquer son métier spécialisé de façon autonome, et a accompli pendant cette période d'emploi, à la fois :
(i) the actions described in the lead statement for the occupation as set out in the occupational descriptions of the *National Occupational Classification*, and	(i) l'ensemble des tâches figurant dans l'énoncé principal établi pour le métier spécialisé dans les descriptions des métiers spécialisés de la *Classification nationale des professions*,
(ii) a substantial number of the main duties listed in the description of the occupation set out in the *National Occupational Classification*, including all of the essential duties;	(ii) une partie appréciable des fonctions principales du métier spécialisé figurant dans les descriptions des métiers spécialisés de la *Classification nationale des professions*, notamment toutes les fonctions essentielles;
(c) they have met the relevant employment requirements of the skilled trade occupation specified in the application as set out in the	c) satisfait aux conditions d'accès du métier spécialisé visé par sa demande selon la *Classification nationale des professions*,

National Occupational Classification, except for the requirement to obtain a certificate of qualification issued by a competent provincial authority; and

sauf l'exigence d'obtention d'un certificat de compétence délivré par une autorité compétente provinciale;

(d) they meet at least one of the following requirements:

d) satisfait à au moins l'une des exigences suivantes :

(i) they hold a certificate of qualification issued by a competent provincial authority in the skilled trade occupation specified in the application,

(i) il a obtenu un certificat de compétence délivré par une autorité compétente provinciale pour le métier spécialisé visé par sa demande,

(ii) they are in Canada and hold a work permit that is valid on the date on which their application is made and, on the date on which the visa is issued, hold a valid work permit or are authorized to work in Canada under section 186, and

(ii) il se trouve au Canada et est titulaire d'un permis de travail valide au moment de la présentation de sa demande de visa de résident permanent et, au moment de la délivrance du visa, il est titulaire d'un permis de travail valide ou est autorisé à travailler au Canada au titre de l'article 186, les conditions suivantes étant réunies :

(A) the work permit was issued based on a positive determination by an officer under subsection 203(1) with respect to their employment in a skilled trade occupation,

(A) le permis de travail lui a été délivré à la suite d'une décision positive rendue par l'agent conformément au paragraphe 203(1) à l'égard de son emploi dans un métier spécialisé,

(B) they are working for any employer specified on the work permit, and

(B) il travaille pour un employeur mentionné sur son permis de travail,

(C) they have an offer of employment — for continuous full-time work for a total of at least one year in the skilled trade occupation that is specified in the application and is in the same minor group set out in the National Occupational Classification as the occupation specified on their work permit — that is made by up to two employers who are specified on the work permit, none of whom is an embassy, high commission or consulate in Canada or an employer who is referred to in any of

(C) il a reçu d'au plus deux employeurs mentionnés sur son permis de travail — autres qu'une ambassade, un haut-commissariat ou un consulat au Canada ou qu'un employeur visé à l'un des sous-alinéas 200(3)h)(i) à (iii) — sous réserve de la délivrance du visa de résident permanent, une offre d'emploi à temps plein pour une durée continue totale d'au moins un an pour le métier spécialisé visé par sa demande et faisant partie du même groupe intermédiaire, prévu à la *Classification nationale des*

subparagraphs 200(3)(h)(i) to (iii), subject to the visa being issued to the foreign national,

(iii) they are in Canada and hold a work permit referred to in paragraph 204(a) or (c) — that is valid on the date on which their application is received — and, on the date on which the visa is issued, hold a valid work permit or are authorized to work in Canada under section 186, and the circumstances referred to in clauses (ii)(B) and (C) apply,

(iv) they do not hold a valid work permit or are not authorized to work in Canada under section 186 on the date on which their application is made and

(A) up to two employers, none of whom is an embassy, high commission or consulate in Canada or an employer who is referred to in any of subparagraphs 200(3)(h)(i) to (iii), have made an offer of employment to the foreign national in the skilled trade occupation specified in the application for continuous full-time work for a total of at least one year, subject to the visa being issued to them, and

(B) an officer has approved the offer for full-time work — based on an assessment provided to the officer by the Department of Employment and Social Development, on the same basis as an assessment provided for the issuance of a work permit, at the request of up to two employers or an officer — that the requirements set out in subsection 203(1) with respect to the offer have

professions, que le métier mentionné sur son permis de travail,

(iii) il se trouve au Canada et est titulaire du permis de travail visé par un des alinéas 204a) ou c), lequel est valide au moment de la présentation de sa demande de visa de résident permanent et, au moment de la délivrance du visa, il est titulaire d'un permis de travail valide ou est autorisé à travailler au titre de l'article 186, et les conditions visées aux divisions (ii)(B) et (C) sont réunies,

iv) il n'est pas titulaire d'un permis de travail valide ou n'est pas autorisé à travailler au Canada au titre de l'article 186 au moment de la présentation de sa demande de visa permanent, et les conditions suivantes sont réunies :

(A) au plus deux employeurs — autres qu'une ambassade, un haut-commissariat ou un consulat au Canada ou qu'un employeur visé à à l'un des sous-alinéas 200(3)h)(i) à (iii) — ont présenté à l'étranger une offre d'emploi à temps plein d'une durée continue totale d'au moins un an pour le métier spécialisé visé dans la demande, sous réserve de la délivrance du visa de résident permanent,

(B) un agent a approuvé cette offre d'emploi sur le fondement d'une évaluation — fournie par le ministère de l'Emploi et du Développement social à la demande d'un ou de deux employeurs ou d'un agent, au même titre qu'une évaluation fournie pour la délivrance d'un permis de travail — qui énonce que les exigences prévues au paragraphe 203(1) sont remplies à

been met, and

(v) they either hold a valid work permit or are authorized to work in Canada under section 186 on the date on which their application for a permanent resident visa is made and on the date on which it is issued, and

(A) the circumstances referred to in clauses (ii)(B) and (C) and subparagraph (iii) do not apply, and

(B) the circumstances referred to in clauses (iv)(A) and (B) apply.

l'égard de l'offre,

(v) au moment de la présentation de sa demande de visa de résident permanent et au moment de la délivrance du visa, il est titulaire d'un permis de travail valide ou est autorisé à travailler au Canada au titre de l'article 186, et les conditions suivantes sont réunies :

(A) les conditions visées aux divisions (ii)(B) et (C) et au sous-alinéa (iii) ne sont pas remplies,

(B) les conditions visées aux divisions (iv)(A) et (B) sont réunies.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2425-14
STYLE OF CAUSE:	JUVENAL DA SILVA CABRAL ET AL v MINISTER OF CITIZENSHIP AND IMMIGRATION ET AL
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 8, 2016
ORDER AND REASONS:	ZINN J.
DATED:	SEPTEMBER 14, 2016

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