Federal Court  Cour fédérale

Date: 20110211

Docket: IMM-2517-10

Citation: 2011 FC 167

Ottawa, Ontario, February 11, 2011

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

MANDEEP KAUR GREWAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mandeep Kaur Grewal, the Applicant, seeks judicial review of a decision dated February 3, 2010, in which an Immigration Officer at the Canadian High Commission in New Dehli, India, refused the Applicant permanent residence in Canada. Leave was granted by Justice Mosley on November 5, 2010.

[2] The Applicant put forth her application for permanent residence under the skilled worker class, pursuant to subsection 12(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"). The minimum requirements for the evaluation are set out at sections 75 and 76 of the *Immigration and Refugee Protection Regulations*, SOR 2002/227 ("IRPR"). Generally, the criteria are age, education, experience, arranged employment, adaptability and proficiency in Canada's official languages.

[3] The Applicant takes issue with the evaluation of language proficiency. The Immigration Officer awarded a total of 63 points for the application. Two (2) points were assessed under the Official language proficiency, and none were awarded under the arranged employment category. The Applicant did have arranged employment in Canada as a Retail Trade Manager, but the Immigration Officer was of the opinion that she would not be able to perform the required duties as she did not have sufficient language skills. Basically, the Immigration Officer assessed the Applicant's IETLS scores to conclude on both language proficiency and arranged employment.

[4] The Applicant puts forward a case that hinges on the fairness of her treatment by the Immigration Officer. She also alleges issues pertaining to the sufficiency of the Officer's reasons, as well as the exercise of the Officer's residual discretion under section 76(3) of IRPA. The Court will only take issue with the first element, that of the procedural fairness of the process undertaken by the Immigration Officer.

[5] It is clear that questions of procedural fairness are to be reviewed on the standard of correctness, and this remains true in the context of decisions by Immigration Officers (*Dunsmuir v*

New Brunswick, 2008 SCC 9; *Khan v Canada (Citizenship and Immigration)*, 2009 FC 1312; *Alam v Canada (Citizenship and Immigration)*, 2008 FC 419). In this case, there is evidence to support the Applicant's contention that procedural fairness was breached.

[6] While it is true that the Applicant's IETLS test results were not sufficient for the Immigration Officer to award her more points, there was evidence before the Officer that the Applicant was to undertake a second examination to better her results. Her poor results were allegedly caused by health reasons. The information forwarded by the Applicant's immigration consultant was clear in this respect. Furthermore, it was noted that a second examination was to take place and that the results would be forwarded as soon as they were available.

[7] It appears that the Officer decided before these second test results were not forwarded. However, the Immigration Officer had other evidence to bolster the claim that the poor test results were due to bad health. The Applicant studied for many years and alleges that she used English in the course of her employment and coursework. As such, the Officer knew that further test results were pending or needed to be submitted.

[8] More importantly, not only did the Officer use the poor IETLS scores to make a finding on language proficiency, these were also used as a basis to not award any points under the Arranged Employment criterion, despite evidence that employment was confirmed. In turn, this had repercussions on the Adaptability criterion. The language proficiency assessment was a determination that had a great impact on the application, not least of which on the Arranged Employment criterion.

[9] In this respect, the *OP6 Manual – Federal Skilled Workers* is relevant. While this manual is not binding on the officer, it does provide guidance and orientation in the determinations to be made. One such guideline in regards to Arranged Employment is as follows:

> Officers may take into account the applicant‘s education and training, background, and prior work experience to determine if the applicant meets this requirement. *If they have any concerns about the applicant‘s ability or likelihood to accept and carry out the employment, they will communicate these to the applicant and provide the opportunity to respond*. (emphasis added)

[10] The Immigration Officer’s reasons clearly relate such a concern, as the Applicant’s IETLS test results were the sole basis of the determination of the absence of Arranged Employment, as well as the Language Proficiency requirement. While it is true that the OP6 Manual is not binding, the following comment from Justice Heneghan in *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1398 is relevant, even if it pertains to a different aspect of the OP6 Manual:

> *The Manual purports to assist a visa officer in assessing an application and although without the force of law, it merits some attention*. In this regard, the above-cited provision of that Manual requires a visa officer to give an applicant the opportunity to supply missing documentation concerning settlement funds if they do not initially meet that criteria. (emphasis added)

[11] The finding related to Language Proficiency was determinative of the application. It had direct import on the Language Proficiency factor, the Arranged Employment factor, and consequently, on the Adaptability factor. The consequences of the finding in regards to language proficiency are within the 20-30 point range. Despite this finding, the Applicant fell short by four points, as she is highly educated (Master’s degree), is within a reasonable age and has experience, which is clear from her 63-point evaluation.

[12] Evidently, the Language Proficiency requirement is central to the linguistic objectives of IRPA (see paragraphs 3(b) and 3(b.1) of the IRPA). This Court's Judgment should not be interpreted to lesson the value of linguistic factors in assessing permanent residency requirements, all the contrary. In this respect, the Court does not retain the Applicant's argument that her arranged employment required other languages in which she was proficient in, namely Hindi and Punjabi, and that this was to be considered. The Language Proficiency criterion pertains to Canada's official languages (see subparagraph 76(1)(a)(ii) of the IRPR). Proficiency in other languages, while laudable, is simply not relevant within the requirements for permanent residency under the skilled worker class.

[13] The Applicant's statements and educational background could reasonably infer some knowledge of English. When this is considered with the claims of poor health when taking the IETLS test, it seems as though the Immigration Officer's decision to adjudicate the matter without a fairness letter or an interview is unreasonable, especially as the Officer knew that a second IETLS test was to follow. Surely, procedural fairness calls for further inquiry by the Officer in such a case, through a letter or an interview.

[14] The case is not as in *Al Turk v Canada (Citizenship and Immigration)*, 2008 FC 1396, where no notice was given to the Officer that another English examination was to be taken. Here, there was a notice. Also, the Court disagrees with the Respondent's reading of *El Habet v Canada (Citizenship and Immigration)*, 2009 FC 776, as the matter is wholly different than the case at bar,

as Mr. El Habet did not take issue with his IETLS test results and relied on other grounds for his application.

[15] Although in the context of a work permit application, Justice Beaudry's comments in *Li v Canada (Citizenship and Immigration)*, 2008 FC 1284, at para 35 are on point when he stated that:

> There is no statutory right to an interview (Ali v. Canada (Minister of Citizenship and Immigration), 1998 CanLII 7681 (F.C.), (1998) 151 F.T.R. 1, 79 A.C.W.S. (3d) 140 at paragraph 28). However, procedural fairness requires that an Applicant be given the opportunity to respond to an officer's concerns under certain circumstances. When no extrinsic evidence is relied on, it is unclear when it is necessary to afford an Applicant an interview or a right to respond. Yet, the jurisprudence suggests that there will be a right to respond under certain circumstances.

[16] It is clear that assessing the breadth of procedural fairness in a case must be adapted to the context in which it arises (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817). In this case, where a manual provided clear guidance that more information should be sought, where one finding on language proficiency derailed the whole claim for permanent residence and where there was evidence that another test was to be taken, it seems that procedural fairness should have extended to an interview or a fairness letter. The record is not clear as to why the second IETLS test result was not brought forward, and this test result is not part of the Tribunal Record. It is clear there is a reciprocal obligation on the part of the Applicant and the Officer to ensure all the information is accounted for and brought forth diligently, which in this case may have been lacking on the part of both Parties.

[17] In a case such as this, this Court finds that immigration policy must be meaningfully addressed. This implies that the matter be sent for redetermination, as the Applicant could be found

to be well above the passing score of 67 for permanent residence. As such, the application for judicial review is granted. No question for certification arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted and the matter shall be returned to a different Visa Officer for a new, complete determination. No question is certified.

"Simon Noël"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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