

Federal Court



Cour fédérale

**Date: 20110624**

**Docket: IMM-4397-10**

**Citation: 2011 FC 770**

**Ottawa, Ontario, June 24, 2011**

**PRESENT: The Honourable Mr. Justice Near**

**BETWEEN:**

**PARDEEP KUMAR  
AMARJIT KAUR JASSI**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of a decision of N. Gautam, a Designated Immigration Officer (the Officer), dated June 3, 2010, refusing the Applicants' application for permanent residence in Canada under the skilled worker class. Based on the Principal Applicant's International English Language Testing System (IELTS) test score, the Officer was not satisfied that the Principal Applicant (PA) would be able to perform and would be likely to accept and carry out his pre-arranged employment in Canada.

[2] Based on the reasons below this application is allowed.

I. Background

A. *Factual Background*

[3] The PA, Pardeep Kumar, is an Indian citizen. He applied for permanent residence in Canada under the skilled worker class in August 2009. His application was based on arranged employment in Canada as a construction supervisor for a construction company in Brampton, Ontario. The prospective employer obtained a positive Arranged Employment Opinion (AEO) from Human Resources and Skills Development Canada (HRSDC) on April 22, 2009.

[4] By letter dated June 3, 2010, the PA was informed that the visa office in the Canadian High Commission in New Delhi had denied his application for permanent residence as a skilled worker.

B. *Impugned Decision*

[5] Based on the PA's IELTS test score, the Officer was "not satisfied that [the PA would] be able to perform and likely to accept and carry out the employment in Canada." He was therefore not awarded any points for the arranged employment. He received a total of 59 points which was insufficient to meet the minimum requirement of 67 points to qualify for permanent residence in Canada.

## II. Issues

[6] The Applicant raises one issue: Whether the Officer's decision to award the PA zero points for the arranged position without an interview was reasonable based on the evidence before him.

This issue is best examined from two angles:

- (a) Was the Officer's conclusion that the PA's language skills were basic, and that he was therefore not qualified for the position reasonable?
- (b) In coming to this conclusion, did the Officer violate the PA's right to procedural fairness by failing to conduct an interview?

## III. Standard of Review

[7] A visa officer's exercise of discretion in assessing an application for permanent residence as a skilled worker is a question of mixed fact and law that attracts a standard of review of reasonableness (*Roberts v Canada (Minister of Citizenship and Immigration)*, 2009 FC 518 at para 15).

[8] Issues of natural justice and procedural fairness are questions of law and warrant review on a standard of correctness. As a result the decision maker is owed no deference (*Malik v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1283 at para 22).

IV. Argument and Analysis

A. *Did the Officer Reasonably Conclude that the PA's Language Skills Were Basic?*

[9] The PA submits that the Officer rejected the PA's application because he concluded that the PA was not qualified for his arranged employment. This conclusion seems to be based on the Officer's assessment that the PA did not have the requisite English language ability to carry out the functions of the position, because according to his IELTS test scores, his English skills were "basic." The PA argues that, in fact, a review of the PA's scores, which were 4.5 in reading, 5 in writing and listening and 5.5 in speaking, alongside a review of the relevant immigration manual, reveal that the PA's English skills should have been considered to be "moderate". The Overseas Processing Manual 6 – Federal Skilled Workers (OP 6 Manual) suggests that a score of 5 or above indicates a moderate skill level.

[10] The Respondent takes the position that the PA refers to an earlier version of the OP 6 Manual, dating from October 28, 2004. The current version, dating from August 4, 2010, provides a test score equivalency chart for applications received or test reports dated on or after November 28, 2008. The PA's IELTS test scores dated from his examination of July 23, 2009, and his application for permanent residence was received, according to the Computer Assisted Immigration Processing System (CAIPS) notes, September 30, 2009. As such, the Respondent argues that section 12.9 of the current OP 6 Manual applies to the PA. This section makes it clear that the PA's listening, reading and writing scores are "basic", while his speaking score corresponds

to the bottom end of the “moderate” range. Therefore the Officer did not err in his assessment of the PA’s language skills.

[11] I have reviewed the relevant sections from the earlier and current versions of the OP 6 Manual. Reference to the earlier version would indeed have placed the PA’s English skills, except that of writing, in the moderate category. Reference to the current version, as the Respondent contends, would put the PA’s reading, writing and listening skills at the basic level. The question becomes, which version of the OP 6 Manual properly applies to the present matter?

[12] I accept the PA’s submissions on this point. The CAIPS notes reveal that a decision was rendered on the PA’s file on June 3, 2010. This pre-dates the effective date of the current version of the OP 6 Manual. Therefore, it is the earlier version of the manual that would have been in effect. According to the earlier version, the PA had moderate English skills in three out of the four categories. If the Officer was relying on the current version when the PA’s application was received, a version not yet publicly available, this raises an issue of procedural fairness. However, given my conclusion with respect to a different aspect of procedural fairness, as outlined below, there is no need to decide whether or not the Officer’s determination of fact with respect to the PA’s correct score on the language test was reasonable. Whether the PA received a basic score or a basic-moderate score is in large measure irrelevant.

B. *Did the Officer Breach the Duty of Procedural Fairness Owed to the PA?*

[13] The PA submits that in the context of this specific case and the evidence that was before the Officer, if the Officer had specific concerns about the PA's language ability with regards to the proposed employment, he should have been called for an interview. The PA argues that the failure to do so represents a breach of natural justice. I agree.

[14] The Respondent makes very fulsome and persuasive submissions regarding the circumstances in which an officer is obligated to provide an applicant with an opportunity to address any concerns. Concerns regarding linguistic competency is not something that officers are able to address at an interview. The OP 6 Manual is unambiguous on this point, stating at section 12.2 that, “[an] interview is not intended to be a means of evaluating language proficiency. Officers cannot change language point awards or make new language point assessments themselves based on what they have discovered at an interview.”

[15] I accept as accurate the Respondent's position that the jurisprudence of this Court has consistently held that the onus is on the applicant to present sufficient information to justify a positive decision and that a visa officer is not required to request further information from an applicant to clarify concerns raised by evidence submitted (*Roberts*, above, at para 21; *Silva v Canada (Minister of Citizenship and Immigration)*, 2007 FC 733, 63 Imm LR (3d) 176 at para 20). I also acknowledge that the OP 6 Manual encourages visa officers to assess straightforward cases based on the information provided and suggests that most selection decisions should be able to be made based on the documentation alone (see section 13.2 of the current version). However, I am

persuaded by the PA's argument that this case was not one without ambiguity that ought to have been addressed by the Officer.

[16] The PA's arranged employment required English and Hindi, and listed Punjabi as an asset. It is unclear which version of the OP 6 Manual the Officer was relying on, but regardless, the PA obtained a score of 5.5 in speaking which is considered moderate by both versions of the Manual.

The Certified Tribunal Record (CTR) lists the duties of the PA's arranged employment as:

“supervise and schedule the activities of workers; establish [sic] meet work schedules and co-ordinate work activities; resolve problems and recommend measures to improve productivity and product qu...” (CTR pg 12). The PA argues that his moderate speaking ability was sufficient to comply with the duties of the arranged employment. Consequently, the PA submits that without interviewing the PA or seeking clarification, it was impossible for the Officer to determine whether the PA would likely be able to fulfill with the requirements of the job.

[17] The PA argues that the failure of the Officer to conduct an independent assessment of the PA's English ability in this context was unreasonable and raises a reviewable error. I must disagree with this particular submission. It is clear that an Officer is unable or unauthorized to independently assess applicants' language ability in an interview.

[18] Officers, however, are directed to conduct interviews to clarify specific information with respect to whether or not an applicant will be able to accept and carry out the arranged employment. Indeed, the version of the OP 6 Manual that the Respondent relies on directs officers who have concerns with the arranged employment at 12.15 to “communicate these to the applicant and

provide the opportunity to respond”. It is clear from the decision letter that the PA was not given a chance to explain whether he was capable of carrying out the functions of the arranged employment.

[19] It is important to recall that the PA received 0 points for arranged employment. The only explanation as to why the PA would not be able to carry out the function of the arranged employment was his IELTS score, yet ironically, the PA received 4 points for English proficiency. There is no indication in either the CAIPS notes or the decision letter as to how the PA’s language ability may have precluded him from carrying out the arranged employment and indeed, no acknowledgement that the employer required not only English skills but also Hindi and Punjab language skills, both of which the PA possessed.

[20] It was unfair for the Officer to reject the PA’s application without a further and more detailed assessment. I find the reasons set out in the decision letter lacking. Consequently, I am of the opinion that this matter should be sent back for reconsideration.

## V. Conclusion

[21] No question to be certified was proposed and none arises.

[22] In consideration of the above conclusions, this application for judicial review is allowed.



**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application for judicial review is allowed.

“ D. G. Near ”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4397-10

**STYLE OF CAUSE:** KUMAR ET AL. v. MCI

  

**PLACE OF HEARING:** TORONTO

**DATE OF HEARING:** MARCH 2, 2011

**REASONS FOR JUDGMENT  
AND JUDGMENT BY:** NEAR J.

**DATED:** JUNE 24, 2011

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