

Federal Court



Cour fédérale

Date: 20130611

Docket: IMM-8543-12

Citation: 2013 FC 625

Ottawa, Ontario, June 11, 2013

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ÛNZILE BURCU BİLGUTAY

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], s 72(1), of a decision that the applicant did not meet the requirements of the Federal Skilled Worker Class.

[2] Ms Bilgütay is a Turkish citizen. She secured an approved Arranged Employment Offer (AEO) from Service Canada for a job as an event coordinator in British Columbia, took the International English Language Testing System (IELTS) examination on May 9, 2009, and submitted an application for permanent residence on February 27, 2011.

[3] In her application, she requested that if she did not score the required number of points, the immigration officer consider using a substituted evaluation in accordance with the CIC guidelines.

[4] A fairness letter was issued by an immigration officer on November 25, 2011 and Ms. Bilgütay's representative replied to it on January 3, 2011. Nonetheless, the visa officer found on June 15, 2012 that Ms. Bilgütay did not possess sufficient command of English and rejected her application.

ISSUES:

[5] The issues before the Court were:

- a. What is the standard of review?
- b. Did the officer err in determining that the IELTS scores indicated a "limited" English ability?
- c. Did the officer err by evaluating the applicant's language abilities against the IELTS website and not explaining why her Canadian Language Benchmarks (CLB) levels meant that she could not perform the position's duties?

[6] The applicable legislation is the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], sections 76 and 79:

**Immigration and Refugee
Protection Regulations
SOR/2002-227**
Selection criteria

76. (1) For the purpose of determining whether a skilled

**Règlement sur l'immigration
et la protection des réfugiés
DORS/2002-227**
Critères de sélection

76. (1) Les critères ci-après indiquent que le travailleur

worker, as a member of the federal skilled worker class, will be able to become economically established in Canada, they must be assessed on the basis of the following criteria:

qualifié peut réussir son établissement économique au Canada à titre de membre de la catégorie des travailleurs qualifiés (fédéral) :

(a) the skilled worker must be awarded not less than the minimum number of required points referred to in subsection (2) on the basis of the following factors, namely,

a) le travailleur qualifié accumule le nombre minimum de points visé au paragraphe (2), au titre des facteurs suivants :

(i) education, in accordance with section 78,

(i) les études, aux termes de l'article 78,

(ii) proficiency in the official languages of Canada, in accordance with section 79,

(ii) la compétence dans les langues officielles du Canada, aux termes de l'article 79,

(iii) experience, in accordance with section 80,

(iii) l'expérience, aux termes de l'article 80,

(iv) age, in accordance with section 81,

(iv) l'âge, aux termes de l'article 81,

(v) arranged employment, in accordance with section 82, and

(v) l'exercice d'un emploi réservé, aux termes de l'article 82,

(vi) adaptability, in accordance with section 83; and

(vi) la capacité d'adaptation, aux termes de l'article 83;

(b) the skilled worker must

b) le travailleur qualifié :

(i) have in the form of transferable and available funds,

(i) soit dispose de fonds transférables — non grevés de dettes ou

unencumbered by debts or other obligations, an amount equal to half the minimum necessary income applicable in respect of the group of persons consisting of the skilled worker and their family members, or

d'autres obligations financières — d'un montant égal à la moitié du revenu vital minimum qui lui permettrait de subvenir à ses propres besoins et à ceux des membres de sa famille,

(ii) be awarded the number of points referred to in subsection 82(2) for arranged employment in Canada within the meaning of subsection 82(1).

(ii) soit s'est vu attribuer le nombre de points prévu au paragraphe 82(2) pour un emploi réservé au Canada au sens du paragraphe 82(1).

Number of points

Nombre de points

(2) The Minister shall fix and make available to the public the minimum number of points required of a skilled worker, on the basis of

(2) Le ministre établit le nombre minimum de points que doit obtenir le travailleur qualifié en se fondant sur les éléments ci-après et en informe le public :

(a) the number of applications by skilled workers as members of the federal skilled worker class currently being processed;

a) le nombre de demandes, au titre de la catégorie des travailleurs qualifiés (fédéral), déjà en cours de traitement;

(b) the number of skilled workers projected to become permanent residents according to the report to Parliament referred to in section 94 of the Act; and

b) le nombre de travailleurs qualifiés qui devraient devenir résidents permanents selon le rapport présenté au Parlement conformément à l'article 94 de la Loi;

(c) the potential, taking into account economic and other relevant factors, for the establishment of skilled workers in Canada.

c) les perspectives d'établissement des travailleurs qualifiés au Canada, compte tenu des facteurs économiques et autres facteurs pertinents.

Circumstances for officer's substituted evaluation

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

Substitution de l'appréciation de l'agent à la grille

(3) Si le nombre de points obtenu par un travailleur qualifié — que celui-ci obtienne ou non le nombre minimum de points visé au paragraphe (2) — 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).

Concurrence

(4) An evaluation made under subsection (3) requires the concurrence of a second officer.

Confirmation

(4) Toute décision de l'agent au titre du paragraphe (3) doit être confirmée par un autre agent.

Official languages

79. (1) A skilled worker must specify in their application for a permanent resident visa which language — English or French — is to be considered their first official language in Canada and which is to be considered their second official language in Canada and must have their proficiency in those languages assessed by an organization or institution designated under subsection (3).

Langues officielles

79. (1) Le travailleur qualifié indique dans sa demande de visa de résident permanent la langue — français ou anglais — qui doit être considérée comme sa première langue officielle au Canada et celle qui doit être considérée comme sa deuxième langue officielle au Canada et fait évaluer ses compétences dans ces langues par une institution ou organisation désignée aux termes du paragraphe (3).

Proficiency in English and French (24 points)

(2) Assessment points for proficiency in the official languages of Canada shall be awarded up to a maximum of 24 points based on the benchmarks referred to in *Canadian Language Benchmarks 2000* for the English language and *Niveaux de compétence linguistique canadiens 2006* for the French language, as follows:

(a) for the ability to speak, listen, read or write with high proficiency

(i) in the first official language, 4 points for each of those abilities if the skilled worker's proficiency corresponds to a benchmark of 8 or higher, and

(ii) in the second official language, 2 points for each of those abilities if the skilled worker's proficiency corresponds to a benchmark of 8 or higher;

(b) for the ability to speak, listen, read or write with moderate proficiency

Compétence en français et en anglais (24 points)

(2) Le maximum de points d'appréciation attribués pour la compétence du travailleur qualifié dans les langues officielles du Canada est de 24, calculés d'après les standards prévus dans les *Niveaux de compétence linguistique canadiens 2006*, pour le français, et dans le *Canadian Language Benchmarks 2000*, pour l'anglais, et selon la grille suivante :

a) pour l'aptitude à parler, à écouter, à lire ou à écrire à un niveau de compétence élevé :

(i) dans la première langue officielle, 4 points pour chaque aptitude si les compétences du travailleur qualifié correspondent au moins à un niveau 8,

(ii) dans la seconde langue officielle, 2 points pour chaque aptitude si les compétences du travailleur qualifié correspondent au moins à un niveau 8;

b) pour l'aptitude à parler, à écouter, à lire ou à écrire à un niveau de compétence moyen :

(i) in the first official language, 2 points for each of those abilities if the skilled worker's proficiency corresponds to a benchmark of 6 or 7, and

(ii) in the second official language, 2 points for each of those abilities if the skilled worker's proficiency corresponds to a benchmark of 6 or 7; and

(c) for the ability to speak, listen, read or write

(i) with basic proficiency in either official language, 1 point for each of those abilities, up to a maximum of 2 points, if the skilled worker's proficiency corresponds to a benchmark of 4 or 5, and

(ii) with no proficiency in either official language, 0 points if the skilled worker's proficiency corresponds to a benchmark of 3 or lower.

(i) dans la première langue officielle, 2 points pour chaque aptitude si les compétences du travailleur qualifié correspondent aux niveaux 6 ou 7,

(ii) dans la seconde langue officielle, 2 points si les compétences du travailleur qualifié correspondent aux niveaux 6 ou 7;

c) pour l'aptitude à parler, à écouter, à lire ou à écrire chacune des langues officielles :

(i) à un niveau de compétence de base faible, 1 point par aptitude, à concurrence de 2 points, si les compétences du travailleur qualifié correspondent aux niveaux 4 ou 5,

(ii) à un niveau de compétence de base nul, 0 point si les compétences du travailleur qualifié correspondent à un niveau 3 ou à un niveau inférieur.

A. Standard of review;

[7] The standard of review for an officer's determination of eligibility for permanent residence under the federal skilled worker class has been determined by jurisprudence to be reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 57; *Khosa*, 2009 SCC 12, at paragraph 59; *Tan v Canada (MCI)*, 2012 FC 1079, at paras 32-33).

B. Did the officer err in determining that the IELTS scores indicated a “limited” English ability?

[8] The Canadian Language Benchmarks (CLB) are the national standard for describing, measuring, and recognizing the English language proficiency of adult immigrants and prospective immigrants for living and working in Canada. The IELTS are one of several language tests which have been designated as being acceptable to assess an applicant's CLB score.

[9] The applicant argued that the officer had erred in assessing her IELTS scores from an overall result of 4.5 as placing her in Band 4, “Limited User”, rather than Band 5, “Modest User”. She argues that as a result the officer evaluated her listening ability as if she had scored 4.0 in the CLB, rather than 4.5.

[10] Her IELTS test results were:

Listening	Reading	Writing	Speaking	Overall
4.5	5.0	6.5	6.5	5.5

[11] The IELTS website gives the following descriptions of the bands in question

(http://www.ielts.org/test_takers_information/getting_my_results/my_test_score.aspx):

Band 4 – Limited User: basic competence is limited to familiar situations. Has frequent problems in understanding and expression. Is not able to use complex language.

Band 5 – Modest User: has partial command of the language, coping with overall meaning in most situations, though is likely to make many mistakes. Should be able to handle basic communication in own field.

[12] The respondent argued that Section 79(2)(c)(i) specifically provides that 1 point should be awarded for basic proficiency where the skilled worker's proficiency corresponds to a benchmark of 4 or 5. The visa officer awarded the applicant 1 point for her listening skills.

[13] I find that this was a reasonable decision within the discretion of the officer.

C. Did the officer err by evaluating the applicant's language abilities against the IELTS website and not explaining why her Canadian Language Bench (CLB) levels meant that she could not perform the position's duties?

[14] The applicant argued that the visa officer had erred in concluding that her language profile showed her to be unable to perform the duties of the offered position. She stated that she had scored somewhere between a Limited User and a Modest User in listening, while achieving better results in the other tested categories. As a Modest User can cope with overall meaning in most situations and can handle basic communication in her own field, she would be able to work in her field.

[15] The respondent argued that the LMO required both oral and written English skills. Given the low proficiency in the listening aspect of oral English, it was open to the visa officer to conclude that the applicant's level of ability did not permit her to carry out the stated duties of the job. The visa officer had made a specific factual finding that the position required better proficiency in English than Ms Bilgütay possessed, and this finding was reasonable.

[16] I might have found differently on this point given the higher speaking and writing scores had I been making the decision below, but the officer appears to have exercised his discretion reasonably. As the respondent argued, it was the officer's responsibility to assess whether the applicant's level of ability actually permitted her to carry out the stated duties of the job. The Court may not interfere with that assessment unless it was made unreasonably.

CERTIFIED QUESTION:

[17] The applicant has proposed that the following question be certified as a serious question of general importance:

Where an officer has concerns over whether an applicant is able to perform and carry out the employment of a job offer, what are the standards, if any, that an officer must use in determining a position language requirement?

[18] The respondent opposes certification of these questions on the grounds that there is no genuine disagreement on the standard and that an answer would not be dispositive in this case. I agree and will not, therefore, certify a question.

JUDGMENT

THIS COURT’S JUDGMENT is that the application is denied. No question is certified.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8543-12

STYLE OF CAUSE: ÜNZILE BURCU BİLGÜTAY

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: May 30, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** MOSLEY J.

DATED: June 11, 2013

APPEARANCES:

Steven Meurrens	FOR THE APPLICANTS
Kim Sutcliffe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

STEVEN MEURRENS Larlee Rosenberg Vancouver, British Columbia	FOR THE APPLICANTS
MYLES J. KIRVAN Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT