Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

IMM-3166-96

BETWEEN:

YURY BARAYEV
RAISA BARAYEVA
YELENA BARAYEVA
POLINA BARAYEVA

Applicants

- AND -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

McKEOWN J.

The applicants, residents of Estonia, apply for judicial review of the decision of a visa officer dated July 19, 1996, wherein he refused their application for permanent residence in Canada given that the principal applicant failed to achieve the minimum 70 units of assessment required to qualify for immigration.

The applicants do not dispute the units of assessment which the visa officer awarded for Factors 1 to 8 of Schedule I to the *Immigration Regulations* (the Regulations) including the two units of assessment which the visa officer awarded for the principal applicant's ability in the English language. The issue is whether the visa officer erred in his assessment of "Personal Suitability" which is Factor 9 of Schedule I.

The applicants submit that the visa officer took into account irrelevant and erroneous criteria when he looked at linguistic ability under Factor 9 and also in saying that the principal applicant "had not demonstrated the initiative to learn about 'Western' made trucks and engines".

The visa officer had the following concerns about the applicants' personal suitability:

> 16. I was concerned about the applicant's motivation, initiative and resourcefulness. The applicant had not contacted possible employers in Canada. He appeared to be ready to rely on his consultant to find him rented accommodation in Canada.
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> 17. Moreover, despite awarding maximum points for experience, I was concerned that he had not demonstrated the initiative to learn about "Western" made trucks and engines.
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> 18. I was also concerned about his adaptability. Although the applicant had been born in Estonia and his spouse had lived at least the past 13 years in Estonia, neither of them spoke Estonian, despite the fact that for the past four to five years, Estonian has been the sole national and official language. Although in certain areas of Estonia, including the one where the Applicant and his family resided, it may be possible to function in Russian, the Applicant has shown little adaptability in adjusting to the present situation in Estonia.
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> 19. According to Schedule I of the Immigration Regulations, the Personal Suitability Factor reflects the personal suitability of the person and his dependants to become successfully established in Canada. In this respect Mrs. Barayeva was of no assistance in raising overall points for Personal Suitability. Despite the fact that she intended to emigrate to Canada and had lived in Estonia for many years, she spoke neither English nor Estonian. This shows both a lack of motivation, initiative and adaptability. Neither her present profession nor intended occupation in Canada were in demand and she had not indicated that she had attempted to contact potential employers in Canada, which likewise shows a lack of motivation, initiative and resourcefulness.
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> 20. For all of the reasons listed above, I believe that two units of assessment accurately reflect the Applicant's and his family's ability to establish successfully in Canada.

The applicant points out that in addition to what the visa officer stated in his affidavit, in his computer notes he stated: "ENGLISH WEAK". In my view he was not bringing back English as a concern under personal suitability or attempting to double count. The visa officer went on to say: "TOTAL LACK OF ABILITY IN ESTONIAN ALSO APPEARS TO INDICATE A LACK OF THE INITIATIVE, RESOURCEFULNESS AND MOTIVATION NEEDED TO

GET HIGH PTS FOR SUITABILITY". The applicants submit that linguistic ability should have been dealt with under Factor 8. If English was dealt with under Factor 9 it would be double counting but if it is a reference to another language in my view it is properly dealt with in Factor 9. In circumstances such as the present case, the visa officer is raising the inability to speak Estonian in connection with the principal applicant's adaptability to the Canadian scene. Although I do not agree with the visa officer on this point, it was open to the visa officer to come to this conclusion. It is not a perverse or capricious conclusion.

The applicant also suggested that the visa officer, by dealing with the applicant's failure to learn about Western made trucks and engines, was double counting experience. It is clear that the visa officer has used the words in paragraph 17 in connection with the applicant's motivation, initiative and resourcefulness and not in connection with experience, a proper consideration under personal suitability. Again, while I would have found otherwise with respect to the learning about Western made trucks and engines, I cannot say that it was a finding that was not open to him or that it was a perverse or capricious finding.

I am also unable to accede to the applicant's argument that these two matters should have been dealt with under subsection 11(3) of the Regulations. In my view, the visa officer properly dealt with these matters under Factor 9 of Schedule I and was dealing with them in connection with the requirements of personal suitability. The criteria set out for personal suitability in Schedule I to the Regulations is as follows:

> Units of assessment shall be awarded on the basis of an interview with the person to reflect the personal suitability of the person and his dependants to become successfully established in Canada based on the person's adaptability, motivation,

initiative, resourcefulness and other similar qualities.

I agree with the statement of Mahoney J.A. in *Zeng v. Canada (Minister of Employment & Immigration)* (1990), 12 Imm. L.R. (2d) 167 at 171 (F.C.A.) where he stated:

> The multitude of conditions which must be met to require the award for arranged employment need not be recited. The point is that this, too, is provided for by the Regulations. Failure or refusal to arrange employment results in the applicant not being awarded 10 points; it is not a proper exercise of discretion, in assessing an applicant's personal suitability, to take that failure into account a second time, and the learned trial Judge erred in holding that to do so was simply inappropriate. It was wrong. Furthermore, none of linguistic accomplishment, arranged employment and family circumstance is "similar qualities" to the qualities required to be taken into account under item 9.

In the *Zeng* case the question was whether English should be taken into account under Factor 9 and not whether the motivation in failing to learn the language of the country where one was working for a number of years could be considered. As I stated earlier, the visa officer was not dealing with linguistic ability but rather the adaptability of the person to the country if the person is not prepared to take the initiative to learn the language of the country that they were working in. It is open to the visa officer to take this into account. As I stated earlier, I would not have reached the same conclusion that the applicants lacked initiative in this respect but it was open to the visa officer to take the opposite position.

The applicant also stated that the visa officer failed to take into account relevant material. The applicant informed the visa officer that he had looked at obtaining OHIP and a social insurance number and instead of this being positive in the eyes of the visa officer, the visa officer took the position that the applicant had answered the wrong question and faulted the applicant for it. Again it was open to the visa officer to take this view and there is no error on this point. In

light of all the submissions in this matter and looking at the entire record, I am satisfied that the position of the visa officer was not patently unreasonable and that this application for judicial review must be dismissed.

I was asked to certify the following question:

> **Has the Supreme Court of Canada's judgment in *Chen v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 350 (T.D.), rev'd [1994] 1 F.C. 639 (F.C.A.), rev'd [1995] 1 S.C.R. 725 obviated the Federal Court of Appeal's judgment in *Zeng v. Canada (Minister of Employment & Immigration)* (1990), 12 Imm. L.R. (2d) 167 (F.C.A.) in that the failure of an applicant for immigration to upgrade his or her linguistic or work related skills may be taken into consideration in the assessment of Factor 9 in Column 1 to Schedule I of the *Immigration Regulations*, so long as the assessment is related to the applicant's ability to become successfully established in Canada on an economically independent basis?**

In my view this question is not dispositive of the matter in question and I am not prepared to certify it.

W. McKeown J.
Judge

VANCOUVER, BRITISH COLUMBIA
April 29, 1997

NAMES OF COUNSEL AND SOLICITORS OF RECORD

STYLE OF CAUSE:	**YURY BARAYEV, RAISA BARAYEVA, YELENA BARAYEVA, POLINA BARAYEVA**
	- and -
	THE MINISTER OF CITIZENSHIP AND IMMIGRATION
COURT NO.:	**IMM-3166-96**
PLACE OF HEARING:	**Toronto, ON**
DATE OF HEARING:	**April 11, 1997**

REASONS FOR ORDER OF McKEOWN, J. dated April 29, 1997

APPEARANCES:

Mr. Dan Miller	**for Applicants**
Mr. Brian Frimeth	**for Respondent**

SOLICITORS OF RECORD:

Mr. Dan Miller **Barrister & Solicitor** **Toronto, ON**	**for Applicants**
George Thomson **Deputy Attorney General of Canada**	**for Respondent**