

Federal Court



Cour fédérale

Date: 20061025

Docket: IMM-7550-05

Citation: 2006 FC 1283

Ottawa, Ontario, October 25, 2006

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ALIREZA HASSANI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Alireza Hassani (the applicant) seeks judicial review of a decision of a visa officer (the "officer"), dated November 8, 2005, wherein the officer determined that the applicant did not meet the requirements for immigration to Canada as a permanent resident under the skilled worker class.

[2] The applicant is a citizen of Iran who applied for permanent residence as a Maintenance/Operations and Account Manager (0722). After a review of the proposed job description, the officer also considered the applicant under the following categories: Personal Officer (1223), Retail Store Supervisor (6211), Retail Store Manager (0621), Automobile Mechanic (7321), Electrical Mechanic (7321), and Denture Technician (3221). The officer assessed the application on the basis of the criteria set out in the *Immigration Regulations, 1978, SOR/78-172 (Immigration Regulations, 1978)* and the *Immigration and Refugee Protection Regulations, 2002, SOR/2002-227 (IRPR)* pertaining to federal skilled workers, as required by subsections 85.1 and 85.3, or 361(4) of the IRPR. In both cases the applicant was assessed to have not met the required criteria.

[3] The decision of the officer was communicated to the applicant on November 28, 2005.

DECISION

[4] The assessment that was conducted by the officer pursuant to the *Immigration Regulations, 1978*, utilized the following factors: education, education & training, experience, the occupational factor, arranged employment or designated occupation, the demographic factor, age, knowledge of the English language, knowledge of the French language, and personal suitability. With respect to the assessment conducted pursuant to the IRPR, the application was assessed against the requirements set out in sections 75 and 76 of the IRPR.

[5] In regards to the assessment made under the *Immigration Regulations, 1978*, the officer allocated zero points for the education, knowledge of English, knowledge of French, and personal suitability factors in all of the occupation categories under which the applicant was assessed. The applicant received no higher than 43 units of assessment (units) for any one of the occupation assessments in total. The officer noted that as an assisted relative, 65 units are required for an immigrant visa to Canada. As this minimum number had not been reached, the officer concluded that he was not satisfied that the applicant would be able to become economically established in Canada.

[6] With respect to the IRPR assessment, the officer concluded on the basis of section 75 that the applicant did not meet the requirements for admission in the skilled worker class. In particular, the officer found that he was not satisfied that the applicant had met the requirement set out in subsection 75(2) (a) of the IRPR.

[7] On the basis of the above, the officer concluded that the applicant did not meet the requirements of the *Immigration and Refugee Protection Act, S.C. 2001 C. 27 (IRPA)* and its regulations. As a result, the officer refused the application.

ISSUES

[8] The issues raised by the parties can be summarized as follows:

1. Did the officer err in awarding the applicant 0 units of assessment pursuant to the personal suitability factor, in the context of the officer's assessment made under the *Immigration Regulations, 1978*?

2. Did the officer err in failing to provide the applicant an opportunity to disabuse her concerns?
3. Did the officer err by failing to assess the applicant's ability in reading, writing and speaking in English, pursuant to Schedule 1 of the *Immigration Regulations, 1978*?
4. Did the officer err in failing to consider the exercise of his discretion pursuant to Section 76 (3) of the IRPR?
5. If the officer erred with respect to any of the above, is the error material?

STATUTORY FRAMEWORK:

[9] Subsections 75, 76 (1), (3) and (4) of the *Immigration and Refugee Protection Regulations, 2002, SOR/2002-227 (IRPR)* state as follows:

<p>75. (1) For the purposes of subsection 12(2) of the Act, the federal skilled worker class is hereby prescribed as a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada and who intend to reside in a province other than the Province of Quebec.</p>	<p>75. (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des travailleurs qualifiés (fédéral) est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada, qui sont des travailleurs qualifiés et qui cherchent à s'établir dans une province autre que le Québec.</p>
<p>(2) A foreign national is a skilled worker if</p>	<p>(2) Est un travailleur qualifié l'étranger qui satisfait aux exigences suivantes :</p>
<p>(a) within the 10 years preceding the date of their application for a permanent</p>	<p>a) il a accumulé au moins une année continue d'expérience de travail à temps plein au sens du</p>

<p>resident visa, they have at least one year of continuous full-time employment experience, as described in subsection 80(7), or the equivalent in continuous part-time employment in one or more occupations, other than a restricted occupation, that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the <i>National Occupational Classification</i> matrix;</p>	<p>paragraphe 80(7), ou l'équivalent s'il travaille à temps partiel de façon continue, au cours des dix années qui ont précédé la date de présentation de la demande de visa de résident permanent, dans au moins une des professions appartenant aux genre de compétence 0 Gestion ou niveaux de compétences A ou B de la matrice de la <i>Classification nationale des professions</i> — exception faite des professions d'accès limité;</p>
<p>(b) during that period of employment they performed the actions described in the lead statement for the occupation as set out in the occupational descriptions of the <i>National Occupational Classification</i>; and</p>	<p>b) pendant cette période d'emploi, il a accompli l'ensemble des tâches figurant dans l'énoncé principal établi pour la profession dans les descriptions des professions de cette classification;</p>
<p>(c) during that period of employment they performed a substantial number of the main duties of the occupation as set out in the occupational descriptions of the <i>National Occupational Classification</i>, including all of the essential duties.</p>	<p>c) pendant cette période d'emploi, il a exercé une partie appréciable des fonctions principales de la profession figurant dans les descriptions des professions de cette classification, notamment toutes les fonctions essentielles.</p>
<p>(3) If the foreign national fails to meet the requirements of subsection (2), the application for a permanent resident visa shall be refused and no further assessment is required.</p>	<p>(3) Si l'étranger ne satisfait pas aux exigences prévues au paragraphe (2), l'agent met fin à l'examen de la demande de visa de résident permanent et la refuse.</p>
<p>76. (1) For the purpose of determining whether a skilled worker, as a member of the</p>	<p>76. (1) Les critères ci-après indiquent que le travailleur qualifié peut réussir son</p>

federal skilled worker class, will be able to become economically established in Canada, they must be assessed on the basis of the following criteria:	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, unencumbered by debts	(i) soit dispose de fonds transférables — non grevés de dettes ou d'autres obligations

<p>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</p>	<p>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,</p>
<p>(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).</p>	<p>(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).</p>
<p>...</p> <p>(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.</p>	<p>...</p> <p>(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) — ne reflète pas 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).</p>
<p>(4) An evaluation made under subsection (3) requires the concurrence of a second officer.</p>	<p>(4) Toute décision de l'agent au titre du paragraphe (3) doit être confirmée par un autre agent.</p>

ANALYSIS

Standard of Review

[10] In *Yaghoubian v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 615, [2003] F.C.J. No. 806 at paras. 24- 29 (QL) [*Yaghoubian*], the Court highlighted that there were two lines of case law indicating what the appropriate standard of review was to apply to a visa officer's decision, one pointing to reasonableness and the other to patent unreasonableness. The Court in *Yaghoubian* further noted that it is important to consider the nature of the issue in question, before determining the appropriate standard of review. As the question before the Court in that case was whether the visa officer had applied the NOC job description properly, which it characterized as a mixed question of fact and law, the Court settled on a standard of review of reasonableness: *Yaghoubian*, at para. 32.

[11] This split in the case law was similarly recognized by the Court in *Hua v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1647, [2004] F.C.J. No. 2106 (QL). The Court concluded in *Hua* that the appropriate standard of review to apply in the context of a visa officer's general decision was patent unreasonableness, at para. 28. This approach was followed in *Bellido v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 452, [2005] F.C.J. No. 572 at para. 5 (QL) [*Bellido*], wherein the Court determined that the visa officer's assessment is an exercise of discretion that should be given a high degree of deference. The Court also discussed this issue in

Kniazeva v. Canada (Minister of Citizenship and Immigration), 2006 FC 268, [2006] F.C.J. No. 336

(QL) [*Kniazeva*], noting as follows:

¶ 15 ... This Court has consistently held that the particular expertise of visa officers dictates a deferential approach when reviewing their decisions. There is no doubt in my mind that the assessment of an Applicant for permanent residence under the Federal Skilled Worker Class is an exercise of discretion that should be given a high degree of deference. To the extent that this assessment has been done in good faith, in accordance with the principles of natural justice applicable, and without relying on irrelevant or extraneous considerations, the decision of the visa officer should be reviewed on the standard of patent unreasonableness [citations removed].

[12] As further noted by the Court in *Kniazeva*, the same cannot be said however when the issue is one of procedural fairness:

¶ 16 ... It is trite law that questions of procedural fairness are not entitled to any deference on judicial review. The Supreme Court of Canada has made it clear that the duty of procedural fairness requires no assessment of the standard of review: a breach of procedural fairness will usually void, in and of itself, the decision under review.

[13] Questions of procedural fairness should be assessed on a correctness standard: *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221, 2001 SCC 4 at para. 65. Where a

breach of the duty of fairness is found, the decision should generally be set aside: *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 461, [2006] F.C.J. No. 631 at para. 44 (QL); *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2005] F.C.J. No. 2056 at para. 54 (QL) [*Sketchley*].

[14] Taking the above framework into account, in the present case, the first issue will be decided on the standard of review of patent unreasonableness. The remaining issues will be decided on the standard of review of correctness.

1. Assessment of the personal suitability factor

[15] As noted by the Court in *Yaghoubian*:

¶ 48 ... The assessment of an applicant's personal suitability is highly discretionary. While a visa officer cannot take into account irrelevant factors in this assessment, the precise point score awarded in this area is highly fact specific and should not be interfered with except in the most egregious of circumstances [emphasis added].

[16] As similarly noted by the Court in *Ataullah v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 936, [2003] F.C.J. No. 1193 (QL):

¶ 8 The decision of a visa officer in relation to personal suitability is about whether the applicant will be able to successfully establish themselves in Canada. This determination involves the exercise of discretion by the visa officer, and the Court should be reluctant to intervene unless there is evidence that the visa officer exercised his discretion in bad faith or in reliance upon extraneous or irrelevant considerations or in a manner inconsistent with either the legislation or the principles of fundamental justice [footnotes excluded, emphasis added].

[17] For example, where the personal suitability factor is found to have not been assessed in accordance with a proper understanding of the criteria on which this factor is based, including a person's adaptability, motivation, initiative, resourcefulness and other similar qualities, the Court may intervene: *Ting v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J.No. 1530 at para. 7 (QL).

[18] In the present case, the applicant argues that his personal suitability was incorrectly assessed because the employment and assistance offered to him by his brother was not duly considered.

[19] It is clear from the officer's notes recorded on the Computer Assisted Immigration Processing System (CAIPS), that the officer was aware of the job that had been offered to the applicant by his brother, as she asked questions in this regard. There is nothing to indicate that the officer did not adequately assess the evidence before her regarding the personal suitability of the applicant with respect to this factor. It is not enough to suggest that a different number of units

should have been allocated; the decision of the officer is fact based and is due a high amount of deference.

[20] In ordinary circumstances, the conclusions of the officer in the present case would not be disturbed. However, as discussed below, the officer erred in her assessment of the applicant's English language capabilities. In light of the fact that language abilities are often a factor considered in the context of assessing personal suitability, for example in the context of determining the adaptability of the applicant, the failure of the officer to uphold the legislative requirements with respect to her assessment of the applicant's English language abilities has rendered her conclusions with respect to the personal suitability of the applicant patently unreasonable.

2. Opportunity to disabuse her concerns

[21] The case law is not clear regarding when a visa officer's concerns must be put to the applicant where those concerns are based on the information submitted by the applicant to the visa officer. For example, in *Hussain v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 468, [2002] F.C.J. No. 596 at paras. 35-37 (QL) [*Hussain*], the Court addressed whether the visa officer had breached his duty of fairness by failing to raise his alleged concerns with the applicant about the applicant's personal suitability and/or his English language fluency, and by failing to provide the applicant with an opportunity to address any such concerns. The Court found that the officer was not required to put before the applicant any tentative conclusions he might be drawing from the material. The Court noted that the visa officer was merely assessing the information provided to him by the applicant as he must do in order to reach a decision. The Court highlighted

that the burden is on the applicant to prove that he has a right to come to Canada. This approach was also taken by the Court in *Bellido*, above, at para. 35.

[22] In *Liao v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1926 (QL) [*Liao*], however, the Court took a different approach, noting:

¶ 15 Visa officers have the duty to give an immigrant the opportunity to answer the specific case against him. This duty of fairness may require visa officers to inform an applicant of their concerns or negative impressions regarding the case and give the applicant the opportunity to disabuse them.

...

¶ 17 However, this duty to inform the applicant will be fulfilled if the visa officer adopts an appropriate line of questioning or makes reasonable inquiries which give the applicant the opportunity to respond to the visa officer's concerns...

In reaching the above conclusion, the Court in *Liao* did not lose sight of the fact that the ultimate burden of proof rests on the applicant. The Court looked to the questions asked by the officer and the information provided to her, before finding that her conclusion was reasonably open to her.

[23] In *Rukmangathan v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 284, [2004] F.C.J. No. 317 (QL) [*Rukmangathan*], the Court offered the following guidance in determining what is required of a visa officer when different types of concerns arise:

¶ 22 ...the duty of fairness may require immigration officials to inform applicants of their concerns with applications so that an applicant may have a chance to "disabuse" an officer of such concerns, even where such concerns arise from evidence tendered by the applicant. Other decisions of this court support this interpretation of *Muliadi*, supra [*Muliadi v. Canada (Minister of Employment and Immigration)*], [1986] 2 F.C. 205 (C.A.)]. See, for example, *Fong v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 705 (T.D.), *John v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 350 (T.D.)(QL) and *Cornea v. Canada (Minister of Citizenship and Immigration)* (2003), 30 Imm. L.R. (3d) 38 (F.C.T.D.), where it had been held that a visa officer should apprise an applicant at an interview of her negative impressions of evidence tendered by the applicant.

¶ 23 However, this principle of procedural fairness does not stretch to the point of requiring that a visa officer has an obligation to provide an applicant with a "running score" of the weaknesses in their application: *Asghar v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1091(T.D.)(QL) at para. 21 and *Liao v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1926. And there is no obligation on the part of a visa officer to apprise an applicant of her

concerns that arise directly from the requirements of the former Act or Regulations: *Yu v. Canada* (Minister of Employment and Immigration) (1990), 36 F.T.R. 296, *Ali v. Canada* (Minister of Citizenship and Immigration) (1998), 151 F.T.R. 1 and *Bakhtiania v. Canada* (Minister of Citizenship and Immigration), [1999] F.C.J. No. 1023 (T.D.)(QL).

In *Rukmangathan*, the Court concluded that the visa officer's problems with the applicant's application, namely, why he had taken further courses in Canada, the consideration that his marks were "low" (although they were in the mid-70s range) and the "poor quality" of two of his educational documents, should have been placed before the applicant for a response. The Court made this finding on the basis that most of the officer's concerns could not be said to have emanated directly from the requirements of the legislation.

[24] Having reviewed the factual context of the cases cited above, it is clear that where a concern arises directly from the requirements of the legislation or related regulations, a visa officer will not be under a duty to provide an opportunity for the applicant to address his or her concerns. Where however the issue is not one that arises in this context, such a duty may arise. This is often the case where the credibility, accuracy or genuine nature of information submitted by the applicant in support of their application is the basis of the visa officer's concern, as was the case in *Rukmangathan*, and in *John and Cornea* cited by the Court in *Rukmangathan*, above.

[25] In the present case, the applicant argues that the officer erred in failing to put her concerns to the applicant, particularly with respect to her concern that he had no experience in "operation/admin/accounting/mgmt", and that he had no English language ability.

[26] The finding of the officer that the applicant had failed to show that he had experience in “operation/admin/accounting/mgmt” and therefore did not meet the qualification of Maintenance/Operations and Account Manager, is a finding based directly on the requirements of the legislation and regulations. The duty was on the applicant to demonstrate that he met the criteria of the occupation under which he had requested his assessment. The applicant was not required to be apprised of the officer’s concerns in this regard with respect to the evidence submitted.

[27] With respect to the question of English language ability, as discussed below, the officer was required under the *Immigration Regulations, 1978* to conduct a language assessment of the applicant. In the present case the officer concluded that the applicant had no English language ability without conducting an assessment, despite the fact that the applicant had assessed himself as being able to speak English with difficulty and being able to read and write well. Other than referencing the fact that the interview had to be conducted with an interpreter, the CAIPS notes of the officer do not reveal how or why her conclusion that the applicant had “no English language ability” was reached. Furthermore, the notes of the officer make it clear that she did not apprise the applicant of her concerns in this regard.

[28] To reach the conclusion she did, the officer must have considered the applicant’s assessment of his own language abilities as not credible. It would be hard to find this conclusion reasonable in light of the fact that there is no evidence that the officer tested the applicant or questioned him in this regard. Before reaching this conclusion, the officer should have put her concerns to the applicant, and should have given the applicant the opportunity to respond in light of the fact that her

concern regarding the credibility of the applicant's English language abilities is not a concern that arises directly from the legislation or regulations. The officer's failure to do so is a breach of procedural fairness.

3. Assessment of language ability

[29] As submitted by the applicant, the mechanisms of language assessment required under the old and new immigration regulations are different. As noted by the Court in *Kniazeva* at para. 35, under the new regulations "visa officers can no longer make subjective assessments of language proficiency" as was the case under the former system, visa applicants must now provide a formal language assessment or in the alternative, documentary evidence demonstrating their language ability.

[30] Under the *Immigration Regulations, 1978*, the assessment of an applicant's language ability regularly took place during the interview. Pursuant to these regulations, an applicant is required to be evaluated in each of their three abilities including reading, writing and speaking where the applicant has asserted some knowledge of an official language: *Joarder v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1510, [2003] F.C.J. No. 1926 at para. 34 (QL) [*Joarder*]. For example, in *Quines v. Canada (Minister of Employment and Immigration)* (1990), 37 F.T.R. 224, [1990] F.C.J. No. 847 (QL), the Court found that the applicant should have been assessed for his French language abilities because the applicant had indicated in his application form that he spoke, read and wrote the language with difficulty.

[31] That being said, the Court has not always been strict in applying the requirement that reading, writing and speaking tests be provided in every case. For example, in *Seo v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1546 at para. 9 (QL), the Court found that the officer's conclusion that the applicant spoke, read and wrote English "with difficulty" was not unreasonable despite the fact that the officer did not get the applicant to write anything in English. The Court found that it was understandable that the officer did not administer a written test in light of the officer's observation that usually she would assess "the writing ability of an applicant by dictating a text but felt that in the instant case it would have been pointless as the applicant did not understand her questions and they had to communicate through an interpreter".

[32] It is clear that in the present case the officer did not test the applicant's English language ability in any of the three categories of reading, writing or speaking. This is an error in light of the fact that the applicant asserted that he had skills in this regard. The officer should have tested all three categories of skill, in light of the fact that the applicant asserted that his reading and writing abilities were better than his speaking abilities. It was therefore not reasonable for the officer in the circumstances of the case to rely on the fact that the interview had to be conducted via an interpreter, to reach the conclusion that the applicant had "no English language ability".

4. Exercise of discretion

[33] Subsection 75(3) of the IRPR clearly states that the failure to meet the requirements of a skilled worker as outlined in section 75(2) of the IRPR will result in an application being rejected and that no further assessment is required. In the present case the applicant was found to have not provided sufficient evidence of any work experience as a Maintenance/Operations and Account

Manager (0722), Personnel Officer (1233), and Retail Store Supervisor (0621), and he was found not to have the education required to be assessed as a Denture Technician (3321). As a result, the applicant was found to have not met the requirements of subsection 75(2) of the IRPR. The officer was therefore not required to consider her discretion under section 76(3) of the IRPR as the assessment of the application failed before the factors listed in section 76 were triggered.

5. Materiality

[34] In the present case, the three errors highlighted above all relate to the failure of the officer to adequately assess the English language abilities of the applicant. This failure rendered the officer's assessment of the applicant's personal suitability patently unreasonable. It also resulted in a finding that the officer had failed to put her concerns to the applicant in this regard, because she reached her conclusion without testing the applicant or apprising the applicant in any way of her concerns. Finally, the officer's failure to assess the applicant's skills was in and of itself a breach of procedural fairness. It is not however enough to find a breach of procedural fairness in the context of this case.

[35] In determining whether an application for judicial review should be allowed on the basis that the visa officer erred in their determination of units for a category such as language ability or personal suitability, the Court has held that the question of whether the change would effect the outcome of the overall case is determinative: *Sharma v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1153, [2001] F.C.J. No. 1586 at para.8 (QL), *Hussain* above, at para. 35. The question being whether or not the error made is material: *Saleem v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 70, [2003] F.C.J. No. 88 at para. 24 (QL).

[36] In *Joarder*, above at para. 35, I concluded that though an assessment of the applicant's ability to read in English should have been made, since this error would not have affected the final outcome of the applicant's application and, in fact, would not have changed the number of units awarded for language, the application for judicial review would not be allowed on this basis.

[37] Similarly, the Court of Appeal found in *Patel v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 55, [2002] F.C.J. No. 178 (QL):

¶ 12 Counsel also submitted that the officer denied Dr. Patel the right to procedural fairness by assessing his English reading ability at a level lower than that at which he had assessed it himself, without giving him an opportunity to demonstrate his true English reading ability. It is a reasonable inference from the record that the officer awarded Dr. Patel 2 points each for his ability to speak, write and read English. Thus, even if he were awarded the maximum of 3 points for his reading ability, he would still have only a total of 69 units of assessment. In other words, even if the officer had committed a breach of procedural fairness in making her assessment of Dr. Patel's ability to read English, it was immaterial.

[38] As further noted by the Court of Appeal in *Patel* at para. 5, the Supreme Court of Canada (SCC) reflected in *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 (S.C.C.) [*Mobil Oil*], on the proposition that the Court has the discretion in judicial review proceedings, where a person's right to procedural fairness has been breached and the

reviewing court is satisfied that the breach could not have changed the result, to not overturn the decision. In *Mobile Oil*, the SCC noted the following in this regard:

¶ 52 The bottom line in this case is thus exceptional, since ordinarily the apparent futility of a remedy will not bar its recognition: Cardinal, supra. On occasion, however, this Court has discussed circumstances in which no relief will be offered in the face of breached administrative law principles: e.g., Harelkin v. University of Regina, [1979] 2 S.C.R. 561. As I described in the context of the issue in the cross-appeal, the circumstances of this case involve a particular kind of legal question, viz., one which has an inevitable answer.

¶ 53 In Administrative Law (6th ed. 1988), at p. 535, Professor Wade discusses the notion that fair procedure should come first, and that the demerits of bad cases should not ordinarily lead courts to ignore breaches of natural justice or fairness. But then he also states:

A distinction might perhaps be made according to the nature of the decision. In the case of a tribunal which must decide according to law, it may be justifiable to disregard a breach of natural justice where the demerits of the claim are such that it would in any case be hopeless.

In this appeal, the distinction suggested by Professor Wade is apt. [Emphasis added].

[39] As further highlighted by the Court in *Gal v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1771, [2004] F.C.J.No. 2167 (QL), it is the inevitability of the answer that is in fact determinative in assessing whether or not a violation of procedural fairness is material.

¶ 13 Given these circumstances, I can conclude that if the matter is referred back to another officer it is inevitable that, by reason of subsection 42(a) of the Act, he or she would come to the same conclusion of inadmissibility [Emphasis added].

[40] Where an answer is not inevitable, a breach of procedural fairness requires that the decision be quashed and sent back for redetermination. As noted by the Court of Appeal in *Sketchley*, above at para. 54: “If the duty of fairness is breached in the process of decision-making, the decision in question must be set aside”. The range of cases in which a breach of procedural fairness will be allowed to stand is therefore quite narrow, as the general rule is that the decision will be quashed. This interpretation of the exception is in keeping with the reasoning of the SCC as expressed in *Mobile Oil*. Only where an outcome is characterized as inevitable, will a breach of procedural fairness be considered immaterial. For example, in the case of a judicial review of a visa officer’s decision, this would include breaches of procedural fairness that would not affect the total amount of units awarded in the case.

[41] The question in the present case is therefore whether the errors highlighted above would definitively result in the same outcome should the case be sent for redetermination.

[42] The failure of the officer to assess the English language ability of the applicant obviously affects the number of units awarded in this category of assessment. This error may have also affected the officer's determination under other categories of assessment, such as personal suitability. As noted above, the decision of the visa officer is very fact specific and highly discretionary. This is reflected in subsection 11(3) of the *Immigration Regulations, 1978* which allocates a broad residual discretion to the visa officer to issue or refuse to issue an immigrant visa, where "there are good reasons why the number of units of assessment awarded do not reflect the chances of the particular immigrant and his dependants of becoming successfully established in Canada". Though not at issue in this case, this provision supports the argument that the Court owes a high degree of deference to the decision of a visa officer, as parliament clearly intended the visa officer to be the one to make immigration visa determinations.

[43] It is therefore not enough for the Court in the present case to assess the materiality of the errors described above by focusing only on the number of units that might be awarded to the applicant for his knowledge of English, if his application was returned for reassessment. The full room provided for the exercise of discretion by a visa officer reconsidering the case must be taken into account, including the fact that the number of units awarded in other categories of assessment might also vary. In assessing the applicability of the exception to the present case, the Court should keep in mind the standard of review owed to decisions rendered by visa officers in general.

[44] In the present case, it cannot be said that the outcome would be inevitable if the application was sent back for re-determination. Though success appears to be highly unlikely, this

is not enough for the Court to find that the breaches of procedural fairness present in this case are immaterial.

[45] In the result, the application is allowed. The decision of the officer is quashed, and the matter will be sent back for redetermination by another officer in accordance with these reasons.

[46] No serious questions of general importance were proposed and none will be certified.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is allowed and the matter remitted for reconsideration by another visa officer in accordance with the reasons provided. No questions are certified.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7550-05

STYLE OF CAUSE: ALIREZA HASSANI

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

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