Date: 20071113

Docket: IMM-5917-06

Citation: 2007 FC 1178

Toronto, Ontario, November 13, 2007

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

DILYANA TODOROVA GIDIKOVA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant is an adult female citizen of Bulgaria. She holds a Masters Degree in Economics from a Bulgarian university and has applied for permanent residence in Canada under the Federal Skilled Worker Class as either a marketing and advertising manager or as an economist.

[2] The Applicant was advised by letter dated July 15, 2006 from the Immigration Section of the Canadian Embassy in Romania that it has been determined that the Applicant did not meet the requirements for immigration to Canada. That letter was signed by one S.C. Bailey, Counsellor (Immigration) purporting to advise that the decision had been made by someone else, one S. Auger

who had interviewed the Applicant on March 14, 2005. No reason was given as to why Auger did not write the letter or whether the decision was made by Auger at some other time and reduced to writing, or, if the decision was recorded, or not, how it was communicated to S.C. Bailey.

[3] As the Applicant submitted her application in 2000 when the *Immigration Act* was still in effect, she was assessed under both the *Immigration Regulations*, 1978 and *the Immigration and Refugee Protection Regulations*, 2002 (*IRP Regulations*). Her application was refused under both sets of *Regulations*. Under the 1978 *Regulations*, she failed to meet the minimum one-year experience requirement as the officer was not persuaded that her prior job experience met the National Occupation Classification (NOC) criteria. Under the *IRP Regulations*, she was four points short of the required threshold.

[4] An Order of this Court permitted the Applicant to be represented by her uncle who resides in Canada. The Application memorandum is not as clear or as concise as it might be however two issues are apparently raised in this application for judicial review:

> *1. Under the 1978 Regulations, did the Officer err in finding that the Applicant lacked experience?*
>
> *2. Under the Immigration and Refugee Protection Regulations, 2002, did the Officer err in finding that the Applicant failed to meet the criteria for permanent residence, specifically in the language and education categories?*

[5] The first issue does not require detailed consideration by this Court as the determination under the 1978 *Regulations* is not seriously contested.

[6] Under the 1978 *Regulations*, skilled worker class applicants are required to obtain at least one unit for the "occupational factor" under subsection 11(1), and one unit for "experience" unless they have arranged employment in Canada, which the Applicant did not have. In her interview notes, Officer S. Auger states that Marketing and Advertising Managers are not in demand. Therefore, the Applicant automatically receives 0 points and cannot be admitted on the basis of this occupation. The Officer also found that the Applicant did not have any experience as an economist, a finding that does not appear to be contested. As a result, the Applicant received 0 points for experience as an economist, and fails to meet the necessary threshold, thus terminating her application.

[7] As to the second issue, the Applicant apparently received a score of zero in respect of English language skills. The Applicant concedes that she has no French language skills. The Applicant argues that she should have received at least 6 points or even 8 points out of a maximum of 24 for English language proficiency. If she received 6 points she would have received at least the minimum number of total points to meet the requirements for immigration to Canada under the 2002 *IRP Regulations*.

STANDARD OF REVIEW

[8] While the assessment of an application for permanent residence in the Federal Skilled Worker Class is a discretionary decision reviewable on a standard of patent unreasonableness (*Kniazeva v. Canada (Minister of Citizenship and Immigration)* (2006), 288 F.T.R. 282 at para. 15); a Visa Officer's determination of language proficiency is reviewable on a reasonableness simpliciter

standard (*Al-Kassous v. Canada (Minister of Citizenship and Immigration*), 2007 FC 541 at para. 12).

2002 *IRP REGULATIONS*

[9] Section 79(1) of the 2002 *IRP Regulations* requires, in respect of language skills, that a skilled worker must specify whether English or French is considered to be their first official language and must:

> a) have their proficiency assessed by a designated organization or institution; or
>
> b) provide other evidence in writing of proficiency in that language.

[10] The Applicant apparently chose the latter course and provided:

- A high school diploma from the Bulgarian Ministry of Science and Education that she graduated having successfully completed a number of courses including English in which she achieved the highest possible score of "excellent – 6".

- A certificate from Pharos School of Languages and Computing, Bulgaria attesting that the Applicant had successfully completed the full course of studies for the Upper-Intermediate Level in English.

[11] The Applicant was interviewed by S. Auger on March 14, 2005. The notes of that Officer state in respect of the Applicant's proficiency in the English language in the context of the old *Immigration Act*:

> *Writes: well. as stated. Did not test.*
> *Reads: well. as stated did not test.*
> *Speaks: well.*
> *6 units.*

[12] The final decision apparently made by S. Auger and communicated by S. C. Bailey awarded zero points for language proficiency. There are a number of problems arising from what evidence there is on the record:

- Why did Auger not communicate the decision to the Applicant? Under what circumstances did Bailey enter the picture and write to the Applicant instead of Auger (?)

- Did Auger made the final decision or did Bailey?

- Why is there no mention in the CAIPS notes or anywhere else on the Record as to what consideration, if any, was given to the high school diploma or the language school certificate? Counsel for the Minister argues that Guideline OP 6 respecting Federal Skilled Workers directs an Officer not to take into consideration results of any language tests by “non-approved testing organizations”. To that extent, the Guideline would not be in accord with section 79(1)(b) that directs that consideration must be given to “other evidence in writing”. The “other evidence” cannot simply be ignored. It must be considered. The record here is simply lacking as to what consideration if any, was given to the written material or, if it was ignored, why?

[13] In *Bellido v. Canada (MCI)*, 2005 FC 452 especially at paragraph 11, Justice Snider of this Court stated that section 79(1) of the *IRP Regulations* requires a determination based on written evidence. An assessment must be made on that evidence and should not simply warrant an award of zero.

> *The June 1, 2005 CAIPS notes state that the Officer was not satisfied that the information submitted by the Applicant was sufficient to meet the "other written evidence" requirement under subsection 79(1)(b). The Applicant was given another chance to submit language test results and was informed that if she did not submit test results, she would be assessed 0 points for language. No test results were submitted.*
>
> *In Shaker v. Canada (Minister of Citizenship and Immigration), 2006 FC 185, Justice Beaudry examined a similar fact situation, where a visa applicant submitted a manuscript and evidence of use of English at work. The Court held at paragraph 40 that although the test results may be preferable, the Applicant's submission should have enabled the Officer to assess the Applicant's proficiency. Justice Beaudry went on to find that although the evidence showed that the Applicant's English was not spectacular, it certainly did not warrant a score of zero:*
>
>> ***42*** *While the presence of many mistakes in the applicant's manuscript and the relatively poor grades he obtained while studying English certainly would not warrant the attribution of full marks, I find that it was patently unreasonable for the Officer to attribute him a score of zero. The applicant's evidence reveals that he has considerable experience working in English, and though his mastery of the language is certainly less than perfect, he clearly has the ability to communicate in English at some level.*

[14] It was unreasonable for the Officer to do what was apparently done in this case. The Officer was required to assess the qualification based on the material provided by the Applicant which material arguably might have led the Officer to award at least 6 points.

[15] It is apparent that either the Officer at the time misunderstood what was required or there was a miscommunication between Officer S. Auger and the person writing the letter of July 16, 2006, S. C. Bailey. This is a matter that should be sent back for reassessment by an Officer not being S. Auger or S. C. Bailey who is to be mindful that even if the precise documents that the Officer would have liked to receive are not submitted, the Officer has the duty to make an assessment based on the documents that were submitted.

JUDGMENT

FOR THE REASONS given:

THIS COURT ADJUDGES that:

1. The application is allowed;
2. The matter is retained for redetermination by a different Officer not being S. Auger or S.C. Bailey**;**
3. No question is to be certified;
4. No Order to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5917-06
STYLE OF CAUSE:	DILYANA TODOROVA GIDIKOVA Applicant and MINISTER OF CITIZENSHIP AND IMMIGRATION Respondent
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 13, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	HUGHES J.
DATED:	NOVEMBER 13, 2007

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