Date: 20071210

Docket: IMM-4468-06

Citation: 2007 FC 1293

Ottawa, Ontario, December 10, 2007

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

RUPINDER SINGH TATHGUR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In 2001, Mr. Rupinder Singh Tathgur (the "Applicant") applied for a permanent resident visa as a member of an economic - skilled worker class. The Immigration Officer, Heather Dubé, (the "Visa Officer") determined that the Applicant did not meet the requirements for immigration to Canada as a permanent resident under an economic – skilled worker class. The Applicant now seeks judicial review of the Visa Officer's decision refusing the Applicant's application for a permanent resident visa.

Background

[2] The Applicant is a citizen of India. He has a Bachelor's degree from Punjab Technical University in Jalander, India and was working as a self-employed engineer doing property evaluations for banks and undertaking small projects for individuals. He applied for a permanent resident visa under the assisted relative category and under three skilled worker classes: Contractor and Supervisor – Mechanics and Trades, Construction Estimator and Civil Engineering Technologists and Technicians. The Visa Officer determined he only qualified under the Civil Engineering Technologists and Technicians category and assessed him on that basis.

[3] Since the Applicant's application was made prior to January 1, 2002 and no assessment had occurred by December 1, 2003, the Applicant was assessed under two sets of criteria as provided by the transitional provisions set out under subsection 361(4) of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 ("*IRPA Regulations*"): the first being the *IRPA Regulations* pursuant to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "*IRPA*") and the second being the *Immigration Regulations, 1978*, S.O.R./78-172 ("*Immigration Regulations, 1978*"), pursuant to the former *Immigration Act*, R.S.C. 1985, c. I-2 (the "*Former Act*").

[4] The Applicant was assisted by an immigration consultant who transmitted the Applicant's request to the Immigration Section of the Canadian High Commission in New Delhi on January 19, 2001. The immigration consultant submitted that the Applicant was fluent in English and made a provisional request that, should the Applicant score less than the required

assessment units, the Visa Officer exercise discretion, in the Applicant's favour, as provided under subsection 11(3) of the *Immigration Regulations*, 1978, as was applicable at the time of the Applicant's application.

[5] On March 31, 2004 the Applicant provided his International English Language Testing System (the "IELTS") results in compliance with the *IRPA Regulations*. The Applicant was advised on June 15, 2004 that he did not obtain sufficient points under the *IRPA Regulations* and that he would be assessed under the *Immigration Regulations, 1978*, for which an interview was required. On June 5, 2006, the Visa Officer interviewed the Applicant. The language of the interview was in English and the Visa Officer administered English reading and writing tests in the course of the interview.

[6] In the Applicant's assessment under the *Former Act*, the Visa Officer assessed the Applicant as scoring 64 units pursuant to the *Immigration Regulations, 1978*, 6 units below the minimum 70 units required. The Visa Officer scored the Applicant as attaining 2 units for proficiency in English.

[7] At the conclusion of the interview the Visa Officer advised the Applicant that he did not meet the minimum units required and that he did not qualify to immigrate to Canada under the *Immigration Regulations, 1978*. He was asked if he had further information that he would like considered. The Applicant said he felt the decision was unjust and stated that he had the necessary qualifications. The Visa Officer sent the refusal letter dated June 13, 2006 to the

Applicant via his immigration consultant. Following the June 13, 2006 letter, the immigration consultant wrote to the Visa Officer requesting reconsideration of the application submitting that the Applicant should receive more credits for his technical experience, and knowledge of English. The immigration consultant reiterated that the Applicant also had a close relative in Canada.

Issues

[8] The Applicant raises two issues:

1. Did the Visa Officer err in awarding only two out of a possible nine units of assessment under the knowledge of English factor of Schedule I of the *Immigration Regulations, 1978*?

2. Did the Visa Officer err in failing to exercise her discretion pursuant to subsection 76(3) of the *IRPA Regulations* or subsection 11(3) of the *Immigration Regulations, 1978*?

Standard of Review

[9] The standard of review of decisions made by Visa Officers has been the subject of much analysis. The Supreme Court of Canada has held that while considerable deference should be accorded to immigration officers, the absence of a privative clause, the contemplation of judicial review by the Federal Court, and the individualized nature of the decision suggest the standard be reasonableness *simpliciter* (*Baker v. Canada (Minister of Citizenship and Immigration*),

[1999] 2 S.C.R. 817). On the narrower question of the standard of review of Visa Officer's assessment of language proficiency, the standard has been determined to also be reasonableness *simpliciter* (*Al-Kassous v. Canada (Minister of Citizenship and Immigration*), 2007 FC 541 at para. 22).

[10] The exercise of discretion by a Visa Officer pursuant to section 76(3) of the *IRPA Regulations* or section 11(3) of the *Immigration Regulations, 1978* can manifest itself in at least two ways. First is where the Visa Officer is under an obligation to consider exercising statutory discretion by reason of express request (*Nayyar v. Canada (Minister of Citizenship and Immigration*), [2007] F.C.J. No. 342 at para. 13). Second is where the Visa Officer ought to consider whether to exercise discretion to issue a visa to an applicant given the facts revealed in the application for permanent residence (*Savvateev v. Canada (Minister of Citizenship and Immigration*), [1999] F.C.J. No. 922 at para. 11). In either case, inaction on the part of a Visa Officer to consider whether to exercise discretion would be subject to judicial review as it would be the result of a failure to do an act he or she was lawfully required to do as provided for by section 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as am. In addition, this Court held in *Nayyar*, above, at para. 8, that where a Visa Officer fails to consider the exercise of positive discretion when specifically requested to do so in an applicant's application for permanent residence, this would constitute a breach of procedural fairness and would be reviewed on the correctness standard. However, if the Visa Officer does exercise the subsection 11(3) statutory discretion, the standard of review would be on the reasonableness standard, (*Chen v. Canada (Minister of Citizenship and Immigration*), [1999] F.C.J. No. 528 at para. 25).

The Language Assessment under the Immigration Regulations, 1978

[11] Subsection 8(1) of Schedule I of the *Immigration Regulations, 1978*, provides:

(1) For the first official language, whether English or French, as stated by the person, credits shall be awarded according to the level of proficiency in each of the following abilities, namely, speaking, reading and writing, as follows:	(1) Pour la langue que la personne indique comme sa première langue officielle, le français ou l'anglais, selon son niveau de compétence à l'égard de chacune des capacités suivantes : l'expression orale, la lecture et l'écriture, des cr édits sont attribués de la façon suivante :
(a) for an ability to speak, read or write fluently, three credits shall be awarded for each ability;	a) la capacité de parler, de lire ou d'écrire couramment, trois crédits sont attribués pour chaque capacité;
(b) for an ability to speak, read or write well but not fluently, two credits shall be awarded for each ability;	b) la capacité de parler, de lire ou d'écrire correctement mais pas couramment, deux crédits sont attribués pour chaque capacité;
(c) for an ability to speak, read or write with difficulty, no credits shall be awarded for that ability.	c) la capacité de parler, de lire ou d'écrire difficilement, aucun cr édit n'est attribué pour cette capacité.

[12] The Visa Officer awarded the Applicant two credits each for speaking and reading well and zero credits for writing with difficulty. The *Immigration Regulations, 1978*, at subsection 8(3), specify that credits are converted into units of assessment as follows:

(3) Units of assessment shall be awarded on the basis of the total number of credits awarded under subsections (1) and (2) as	(3) Des points d'appréciation sont attribués sur la base du nombre total de crédits obtenus selon les paragraphes (1) et (2), d'après

follows: (a) for zero credits or one credit, zero units; (b) for two to five credits, two units; and (c) for six or more credits, one unit for each credit.	le barème suivant : a) zéro ou un crédit, aucun point; b) de deux à cinq crédits, deux points; c) six crédits ou plus, un point par crédit

The Applicant had obtained four credits which translated to two units of assessment for knowledge of English.

[13] The Applicant submits that the Visa Officer should have awarded more units for knowledge of English. He argues the Visa Officer unreasonably gave zero credits for his English writing abilities under the *Immigration Regulations, 1978*, despite the IELTS results, which are a component of the assessment under the *IRPA Regulations*, indicating the Applicant had a moderate proficiency in all four abilities: listening, reading writing and speaking.

[14] The Applicant was entitled to be assessed under the *Immigration Regulations, 1978* and the *IRPA Regulations*. Section 361(4) of the *IRPA Regulations* reads:

Pending applications — skilled workers	Demandes pendantes — travailleurs qualifiés
(4) Beginning on December 1, 2003, a foreign national who is an immigrant who made an application under the former Regulations before January 1, 2002 for an immigrant visa as a person described in subparagraph 9(1)(b)(i) or paragraph 10(1)(b) of those	(4) À compter du 1er décembre 2003, l'étranger qui est un immigrant et qui, avant le 1er janvier 2002, a présenté conformément à l'ancien règlement une demande de visa d'immigrant à titre de personne visée au sous-alinéa 9(1)b)(i) ou à l'alinéa 10(1)b)

Regulations, other than a self-employed person within the meaning of subsection 2(1) of those Regulations, and whose application is still pending on December 1, 2003 and who has not, before that day, been awarded units of assessment under those Regulations must, in order to become a permanent resident as a member of the federal skilled worker class,

(a) be awarded at least the minimum number of units of assessment required by those Regulations for a person described in subparagraph 9(1)(b)(i) or paragraph 10(1)(b) of those Regulations, other than a self-employed person within the meaning of subsection 2(1) of those Regulations; or

(b) meet the requirements of subsection 75(2) and paragraph 76(1)(b) of these Regulations and obtain a minimum of 67 points based on the factors set out in paragraph 76(1)(a) of these Regulations (emphasis added).

de l'ancien règlement, autre qu'un travailleur autonome au sens du paragraphe 2(1) de ce règlement, et dont la demande est pendante le 1er décembre 2003 et qui n'a pas obtenu avant cette date de points d'appréciation en vertu de l'ancien règlement doit, pour devenir résident permanent au titre de la catégorie des travailleurs qualifiés (fédéral) :

a) soit obtenir au moins le nombre minimum de points d'appréciation exigés par l'ancien règlement à l'égard d'une personne visée au sous-alinéa 9(1)b) de l'ancien règlement, autre qu'un travailleur autonome au sens du paragraphe 2(1) de ce règlement;

b) soit satisfaire aux exigences du paragraphe 75(2) et de l'alinéa 76(1)b) du présent règlement et obtenir un minimum de 67 points au regard des facteurs visés à l'alinéa 76(1)a) de ce présent règlement (nous soulignons).

[15] However, these two statutory assessments are conducted separately within the context of their respective schemes given the wording of the transitional provision that provides for

concurrent dual assessments. The difference in the two methods of assessment of language proficiency is that under the *Immigration Regulations, 1978*, the Visa Officer applies a more subjective standard, including the administration of an English comprehension test as well as assessment of writing sample while under the *IRPA Regulations* the Visa Officer follows an objective approach involving standardized English tests administered and assessed by an independent third party.

[16] For the assessment under the *Immigration Regulations, 1978*, the Visa Officer assessed the Applicant's proficiency in English in the course of an interview conducted in English at the Applicant's request. The Visa Officer was aware that the Applicant asserted he had a moderate fluency in English. She administered a reading and writing exercise to the Applicant. The Visa Officer's notes indicate that she assessed the Applicant's English listening, speaking, reading and writing with reference to Canadian Language Benchmarks. Given the foregoing, I cannot conclude that the Visa Officer's conclusion about the Applicant's proficiency in English, as assessed under the *Immigration Regulations, 1978*, and in particular his writing, was unreasonable.

Subsection 11(3), Discretion under the Immigration Regulations, 1978

[17] The immigration consultant who initially transmitted the applicant's application for a permanent resident visa made the following request:

> "Although not anticipated, if Mr. Rupinder Singh Tathgur scores less than 65 units of assessment, it is respectfully submitted that such

> would not reflect Mr. Rupinder Singh Tathgur's prospects of becoming successfully established in Canada. We therefore request that you exercise positive discretion under **s.11 (3)**of the Immigration **Regulations**, 1978 if Mr. Rupinder Singh Tathgur scores less than 65 units of assessment (emphasis in original).

[18] The Visa Officer's denial letter dated June 13, 2006 does not make any reference to consideration of this request. The Visa Officer's notes and her subsequent affidavit also do not disclose if she considered exercising her discretion.

[19] Subsequent to the receipt of the refusal letter, the immigration consultant wrote to the Visa Officer requesting reconsideration of Mr. Tathgur's application on the grounds that more points should have been awarded for technical experience and knowledge of English. The immigration consultant submitted that, as the Applicant had education, experience, and a close relative in Canada, he was suitable to become economically established in Canada. The immigration consultant did not expressly renew the request that the Visa Officer exercise the statutory discretion provided by subsection 11(3) of the *Immigration Regulations, 1978*. Neither the Applicant's Record nor the Visa Officer's refusal letter discloses any reply to the request for reconsideration.

[20] Since neither the Visa Officer's notes of the interview nor her letter of June 13, 2006 make any mention of her considering the request she exercise the subsection 11(3) discretion, I conclude that she did not turn her mind to whether to exercise the statutory discretion.

[21] The Applicant claims that, in effect, the Visa Officer's failure to consider exercising the statutory discretion either under subsection 11(3) of the *Immigration Regulations, 1978* or the same discretion under subsection 76(3) of the *IRPA Regulations* is an error of law.

[22] The Respondent, the Minister of Citizenship and Immigration, argues that the Visa Officer did not have to consider exercising her statutory discretion under subsection 11(3) of the *Immigration Regulations, 1978* or subsection 76(3) of the *IRPA Regulations* for the following reasons:

> 1) the Applicant's request for the exercise of statutory discretion was merely a *pro forma* request made in his letter of application;
>
> 2) the Applicant did not specify reasons for believing he would be successfully established in Canada when he was given the opportunity to provide additional information and he did not invoke the discretion by setting out such factors;
>
> 3) the Applicant did not request the same discretion under subsection 76(3) of the *IRPA Regulations*; and
>
> 4) the exercise of discretion should only be decisive in cases that provide unusual facts or where an applicant comes close to the required units of assessment.

[23] The initial request for the exercise of discretion under subsection 11(3) was made provisionally by the immigration consultant at the beginning of the application process.

However, the request was clearly expressed and was not a *pro forma* request in that it was not a mere formality empty of significance. The request contemplated the possibility that the Applicant may not succeed in the regular immigration visa assessment process and was tendered to address that prospect.

[24] The Applicant did not renew the request at the close of the final session with the Visa Officer when he was given the opportunity to provide further information or make further submissions. It is understandable that the Applicant, disappointed with the outcome of the interview, might not think of repeating a request that the Visa Officer consider exercising her statutory discretion. Further, the Applicant did not waive any consideration of the statutory discretion requested in his initial application. For a waiver of his prior request, it would have to be clear that the Applicant turned his mind to that matter. Neither the invitation by the Visa Officer or the Applicant's response demonstrates the Applicant was mindful of, and waived, his initial request to have the Visa Officer consider exercising her statutory discretion. Further, it is to be noted that the immigration consultant did make a request for reconsideration subsequent to the June 13, 2006 rejection by the Visa Officer.

[25] The Respondent states the Applicant did not make a request for consideration under subsection 76(3) of the *IRPA Regulations*. However, subsection 361(4) of the *IRPA Regulations* contemplates a dual assessment process for those applicants caught by the transition from the *Former Act* to the *IRPA*. Implicit in this transitional provision is the availability of statutory exercise of discretion under either process whether pursuant to subsection 11(3) of the *Immigration Regulations, 1978* or subsection 76(3) of the *IRPA Regulations*. I would conclude

that the Applicant, having requested consideration under the statutory provision under subsection 11(3) and having been assessed under both the *Immigration Regulations, 1978* and the *IRPA Regulations,* is entitled to have his request considered under the statutory discretion provision under both the *Immigration Regulations, 1978* and the *IRPA Regulations*. I would also note that the Applicant submitted his application on January 19, 2001 and the *IRPA Regulations* did not come into force until 2002. It was not possible, at the time of his application, for the Applicant to also request the exercise of discretion under the *IRPA Regulations.*

[26] Subsection 11(3) of the *Immigration Regulations, 1978* states:

11(3) (3) A visa officer may (a) issue an immigrant visa to an immigrant who is not awarded the number of units of assessment required by section 9 or 10 or who does not meet the requirements of subsection (1) or (2), or (b) refuse to issue an immigrant visa to an immigrant who is awarded the number of units of assessment required by section 9 or 10, if, in his opinion, 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 and those reasons have been submitted in writing to, and approved by, a senior immigration Officer (emphasis added).	11(3) (3) L'agent des visas peut (a) délivrer un visa d'immigrant à un immigrant qui n'obtient pas le nombre de points d'appréciation requis par les articles 9 ou 10 ou qui ne satisfait pas aux exigences des paragraphes (1) ou (2), ou (b) refuser un visa d'immigrant à un immigrant qui obtient le nombre de points d'appréciation requis par les articles 9 ou 10, s'il est d'avis qu'il existe de bonnes raisons de croire que le nombre de points d'appréciation obtenu ne reflète pas les chances de cet immigrant particulier et des personnes à sa charge de réussir leur installation au Canada et que ces raisons ont été soumises par écrit à un agent d'immigration supérieur et ont çu l'approbation de ce dernier

(nous soulignons).

[27] The Respondent submits that the subsection 11(3) discretion is only a factor where it will likely have an impact on the outcome. The Respondent relies on *Chen*, above, at para. 23, where Justice Evans characterized the exercise of discretion as residual stating:

> Without trespassing on the discretion conferred upon visa officers by subsection 11(3), I would have thought that the discretion in question is residual in nature, and should be decisive only in cases that present unusual facts, or where the applicant has come close to obtaining 70 units of assessment.

[28] In *Lam v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1239 at para. 6, Justice Rothstein noted that if an applicant wished to have a Visa Officer exercise discretion under subsection 11(3) the applicant would have to indicate some good reasons why a unit of assessment determination did not reflect the chances of successful establishment in Canada by the applicant. Justice Rothstein went on to state that:

> Where an applicant has reason to believe he or she may be successfully established in Canada, irrespective of the units of assessment determination, he or she should apply for determination under subsection 11(3) setting forth relevant reasons.

[29] It is not for the Court to speculate on what the outcome of a Visa Officer's exercise of the discretion would be under subsection 11(3). As Justice Gauthier stated in *Yan v. Canada (Minister of Citizenship and Immigration*), [2003] F.C. J. No. 655 at para. 24:

> Nevertheless, even if at this stage the chance of success of such a request appears very slim, the Court cannot conclude that a visa officer would necessarily refuse to exercise the discretion provided in subsection 11(3) of the Regulations in favour of Yun Yan. The court would have to speculate about the results of such an exercise. This would mean going beyond the exception to the strict rule that a breach of procedural fairness will normally void the decision. (See Mobile Oil Canada Ltd. V. Canada-Newfoundland Offshore Petroleum Board [1994] 1 S.C.R. 202, at page 228; Yassine v. Canada (Minister of Citizenship and Immigration) (1994), 172 N.R. 308 (F.C.A.)). Therefore, the decision must be set aside.

[30] The legislation gives the discretion to immigration officers who are knowledgeable in immigration matters and skilled in such evaluations as to what may be good reasons to grant an immigration visa notwithstanding the results achieved under the *Former Act* and its regulations. In the application for a permanent resident visa filed on behalf of the Applicant, the Applicant's immigration consultant sets out, in some detail, the Applicant's personal background and an estimate of the units of assessment that the immigration consultant thinks the Applicant warrants. Further, the immigration consultant provides a rationale for the units of assessment that he assesses in respect of the education and training factor, the work experience factor, the knowledge of English factor and the personal suitability factor. Immediately preceding the request for the exercise of positive discretion, the immigration consultant concludes that the Applicant meets the requirements set out under the Immigration Regulations, 1978. I am satisfied that the rationale provided by the consultant is "good reason" for the consideration of the exercise of discretion. Where a "good reason" is offered by an applicant, as is the case in this application, the Court ought not to speculate on the merits of the reasons.

[31] Subsection 76(3) and 76(4) of the *IRPA Regulation* states:

Circumstances for officer's substituted evaluation	Substitution de l'appréciation de l'agent à la grille
(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 (emphasis added).	(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) (nous soulignons).
Concurrence	Confirmation
(4) An evaluation made under subsection (3) requires the concurrence of a second officer.	(4) Toute décision de l'agent au titre du paragraphe (3) doit être confirmée par un autre agent.

[32] The *IRPA* legislation also gives immigration officers discretion to grant an immigration visa notwithstanding a negative assessment under its regulations. Again, it is not for this Court to speculate on what the outcome of a Visa Officer's exercise of the discretion would be under subsection 76(3) of the *IRPA Regulations*.

[33] I would also note that in enacting the *IRPA Regulations,* Parliament has departed from the wording contained in the *Immigration Regulations, 1978* with respect to a Visa Officer's exercise of discretion. Under the *Immigration Regulations, 1978*, a Visa Officer had the

discretion to issue an immigrant visa notwithstanding that an applicant had not achieved the number of units of assessment required, if, in the Visa Officer's opinion, there were good reasons why the number of units of assessment awarded did not reflect the chances of the applicant becoming economically established in Canada. Under the *IRPA Regulations*, a Visa Officer may substitute the evaluation criteria if the number of points awarded is not a sufficient indicator of whether the applicant will become economically established in Canada.

[34] As a result of the change of wording between the *Immigration Regulations, 1978* and the *IRPA Regulations*, the cases relied on by the Respondent, particularly, *Chen*¸ above, and *Lam*, above, are not directly on point as they refer only to subsection 11(3) of the *Immigration Regulations, 1978* and the Applicant in the case at bar was considered under both sets of regulations. The Respondent argued that the Applicant, in requesting the exercise of discretion, did not specify the reason for believing he would be successfully established in Canada despite not meeting the assessment requirements. While having already decided that the applicant did offer "good reason" for the consideration of positive discretion, it is clear that the *IRPA Regulations* impose no such requirement.

Conclusion

[35] In result, the Visa Officer was asked by the Applicant's agent to consider exercising the statutory discretion under subsection 11(3) of the *Immigration Regulations, 1978*. The Visa Officer did not consider exercising her discretion as requested. Nor did the Visa Officer consider exercising her statutory discretion under subsection 76(3) of the *IRPA Regulations*. The failure

by the Visa Officer to consider exercising the statutory discretion when requested to do so is a failure carry out a statutory responsibility the Visa Officer was obligated to do.

[36] The request for judicial review is granted. The decision of the Visa Officer refusing the Applicant's request for a permanent immigration visa as a member of a skilled worker class is quashed. The matter is to be referred to another Visa Officer for consideration in a manner consistent with these reasons.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed. The decision of the Visa Officer is quashed;
2. The matter is remitted to a different Visa Officer for consideration;
3. No question is to be certified;
4. No order of costs.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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