

Date: 20080609

Docket: IMM-3711-07

Citation: 2008 FC 722

Ottawa, Ontario, June 9, 2008

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

BEHNOUSH ESLAMIEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Eslamieh is an Iranian citizen whose application for permanent resident status in the Skilled Worker category was rejected on July 30, 2007. She had scored 66 points out the possible 100, short by one point of the total required by the Minister pursuant to subsection 76(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[2] Ms. Elsamieh contends that the Visa Officer should have considered her discretion to grant the applicant permanent resident status despite her failure to reach the threshold set by the Minister pursuant to subsection 76(3) of the *IRPA*, which reads as follows:

(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.

(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).

[3] Given that the decision of the Visa Officer is highly discretionary, it is to be reviewed on a standard of reasonableness with great deference shown by the Court: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 at paragraph 53.

[4] Visa Officers have the authority to consider an alternative evaluation under subsection 76(3) by their own motion, as held by my colleague Justice Carolyn Layden-Stevenson in *Zheng v. Canada (Minister of Citizenship and Immigration)*, 2002 FTR 1115, 26 Imm. L.R. (3d) 72. That said, it is clear from the jurisprudence that they are under no obligation to exercise that discretion unless specifically requested to do so. The applicant concedes that she did not make such a request and I cannot therefore find that the Visa Officer was unreasonable in her decision.

[5] Ms. Eslamieh raised a question of natural justice inferentially in her reply brief and at the hearing. She asserted that the Officer should have considered her application in the context of her self-representation and extremely narrow failure to reach the point target. From that perspective, the Officer had an obligation in the name of fairness to consider her discretion under subsection 76(3).

[6] While I am sympathetic to this contention, it is trite law that the applicant is restricted, also for reasons of natural justice and procedural fairness, to arguing issues raised in her application for leave. She sought leave solely on the ground that the officer had erred in law. I cannot now substitute a ground which was not contained therein.

[7] For the above reasons, this application is dismissed. No questions of general importance were proposed.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application for judicial review is dismissed.

No questions are certified.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3711-07

STYLE OF CAUSE: BEHNOUSH ESLAMIEH

AND

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 4, 2008

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

DATED: June 9, 2008

APPEARANCES:

Wennie Lee FOR THE APPLICANT

Deborah Drukarsh FOR THE RESPONDENT

SOLICITORS OF RECORD:

WENNIE LEE FOR THE APPLICANT
Lee & Company
Toronto, Ontario

JOHN H. SIMS, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario