Federal Court  Cour fédérale

Date: 20130522

Docket: IMM-4470-12

Citation: 2013 FC 533

Ottawa, Ontario, May 22, 2013

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

MOHAMMADSADEGH MOHAGHEGHZADEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant and his wife seek to come to Canada under the Federal Skilled Worker (FSW) program. The Visa Officer awarded the applicant 66 points, one short of the required 67, in accordance with sections 76 to 83 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*Regulations*).

[2] The applicant received full points for his education. His wife, who has a six year degree in dental medicine and is licensed to practice in Iran, was awarded four out of a possible five points within the adaptability category. The Visa Officer determined that four points were appropriate, relying on Citizenship and Immigration Canada (CIC) operations manual, OP 6A, which states that medical degrees are generally considered first-level, rather than graduate level, credentials.

[3] The applicant challenges this decision on the basis that the Damascus visa office had been awarding a full five points for medical and dental degrees. His application, however, was transferred from Damascus to Warsaw, due to the availability of resources. He submits that this resulted in a breach of procedural fairness as he had a legitimate expectation that the practice in Damascus would continue and apply to the assessment of his application.

[4] In support of this argument, the applicant tendered an email dated May 3, 2012, from a CIC analyst who explained that the visa office in Damascus had been awarding full points for medical and dental degrees until the summer of 2010, but that the practice had subsequently been standardized in accordance with OP 6A. The applicant buttresses this with the language of OP 1, which addresses the procedure to be followed when a visa application is transferred from one post to another. Section 5.19 provides:

> For assessment purposes, visa offices receiving a transferred file must respect the original date on which the application was received as the "lock-in" date. For processing purposes, all processing steps for the files transferred to an office, including the scheduling of interviews, should be the same as for all other applications received in the office on the date corresponding to the "lock-in" date of the received file. This means that an application that is received in Paris in July 2002 and transferred to New Delhi in March 2003, would enter the New Delhi queue as of July 2002.

[5] The respondent also provided additional affidavit evidence. Julia Gurr Lacasse, an immigration officer who had been transferred from the Damascus office to the Warsaw office in January 2012, explained that since the fall of 2009 the Damascus visa office had been awarding points for Iranian medical degrees in accordance with OP 6A.

Admissibility of Evidence

[6] The first issue to be considered is the admissibility of the affidavit evidence. On judicial review, additional evidence may only be admitted to address issues of procedural fairness and jurisdiction. The merits of the decision are reviewed on the basis of the material that was before the decision maker: *Tabañag v Canada (Citizenship and Immigration)*, 2011 FC 1293, para 14.

[7] The affidavit of Julia Gurr Lacasse is admissible as it responds to the procedural fairness issue alone and does not seek to supplement the decision.

[8] The applicant has also provided an affidavit attaching various exhibits, including a letter from the Shiraz University of Medical Sciences. This evidence is intended to address the merits of the decision and was not before the Visa Officer. Therefore, it cannot be relied on at this stage to bolster the application. The email from a CIC analyst is admissible as, like the affidavit of Julia Gurr Lacasse, it relates to the question of procedural fairness.

Legitimate Expectations

[9] To establish a legitimate expectation the applicant must show that CIC made "clear, unambiguous and unqualified" representations regarding what process would be followed: *Canada (Attorney General) v Mavi*, 2011 SCC 30, para 68. Legitimate expectations can only pertain to the process, not a specific outcome: *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41, para 35.

[10] CIC did not make the unambiguous representations required to sustain a plea of legitimate expectations. Section 10.2 of OP 6A provides that medical and dental degrees will generally be considered first-level degrees absent evidence to the contrary:

> Medical doctor degrees are generally first-level university credentials, in the same way that a Bachelor of Law or a Bachelor of Science in Pharmacology is a first level, albeit "professional" degree and should be awarded 20 points. If it is a second-level degree and if for example, it belongs to a Faculty of Graduate Studies, 25 points may be awarded. If a bachelor's credential is a prerequisite to the credential, but the credential itself is still considered a first-level degree, then 22 points would be appropriate. It is important to refer to how the local authority responsible for educational institutions recognizes the credential: i.e., as a first-level or second-level or higher university credential.

[11] There are two components to the applicant's argument that he had a legitimate expectation that his wife's dentistry degree would be evaluated as a second-level degree. The first is based on the respondent's own guidance in OP 1 5.19 as to lock-in dates. The second is based on the practice of the Damascus office.

[12] OP 1 5.19 does not constitute a representation as to how a file will be assessed. It is simply a guarantee that visa applicants do not lose their place in the queue on transfer. It is not a guarantee that an application would be "locked in" to a certain set of practices or criteria prevailing at the time

in the embassy or consulate where the application was received. The applicant's argument amounts to a substantive right to a certain outcome, namely that the degree would be considered a second-level degree, resulting in five points rather than four.

[13] Turning to the second prong of the applicant's argument, the practice in Damascus of treating medical degrees as second-level degrees does not support a plea of legitimate expectations. In my view, this argument falls squarely with the language of Justice Eleanor Dawson, then of this Court, in *Yoon v Canada (Citizenship and Immigration)*, 2009 FC 359, at paragraph 20:

> Ms. Yoon's argument cannot succeed. No legitimate expectation can exist that is contrary to express provisions of the Regulations. Further, in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at paragraph 26, the Supreme Court of Canada confirmed that "the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain." What Ms. Yoon seeks is the conferral of a substantive, not a procedural, right. This cannot be obtained pursuant to the doctrine of legitimate expectations.

Reasonableness of the Decision

[14] The applicant's second argument relates to the merits of the decision.

[15] There is some question as to the appropriate standard of review for this issue. In *Khan v Canada (Citizenship and Immigration)*, 2011 FCA 339, the Federal Court of Appeal provided that "the standard of review to be applied to a visa officer's decision is correctness". In that appeal, the issue was the visa officer's interpretation of subsections 78(2) and (3) of the *Regulations*. Since then, the Supreme Court of Canada has provided that a tribunal's interpretation of its home statute or a statute closely connected to its function is presumptively entitled to deference: *Alberta*

(Information and Privacy Commissioner) v Alberta Teachers' Association, 2011 SCC 61 at paras 30-34.

[16] As Justice Mary Gleason observed in *Qin v Canada (Citizenship and Immigration)*, 2013 FC 147, *Khan* could be interpreted as mandating a correctness standard of review for all aspects of a visa officer's decision, including questions of mixed fact and law. However, I agree with Justice Gleason's conclusion that, properly understood, *Khan* provides that correctness is the standard of review for matters of statutory interpretation only. Reasonableness is the standard of review for questions of mixed fact and law, the issue for the present application.

[17] Reasonableness, it is well known, contemplates a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. That certain visa officers may have, for a period of time, considered Iranian dental degrees to be at the graduate level does not narrow the range of reasonably acceptable outcomes or fetter their discretion for subsequent decisions. Each visa officer is empowered to make an independent assessment of an application. There is no requirement for uniformity. In each case the decision is assessed against the legal framework and the principles of administrative law.

[18] Here, there was no evidence before the Visa Officer to support a conclusion that the dentistry degree was a second-level university degree or was issued by a faculty of graduate studies. Therefore, the Visa Officer's decision survives scrutiny on either the reasonableness or correctness standard.

[19] While the letter from the Shiraz University of Medical Sciences is inadmissible, it does not in any event, advance the applicant's position. The letter states that the "Dental Medicine Doctor Degree is accredited as an M.S. Degree for admission to a PhD program." It does not address whether it is a graduate degree or was issued by a graduate studies faculty. As Justice Judith Snider observed in *Sirous Nekooei v Canada (Citizenship and Immigration)*, May 4, 2011 (IMM-5704-10), the definition of "educational credential" in section 73 of the *Regulations* requires that the degree or diploma be recognized by the authorities responsible for supervision and regulation of such institutions in the country of issue. The author of that letter, as Head of Admissions, is unlikely to be an accrediting body as contemplated by the *Regulations*.

[20] Other judges of this Court have found decisions reasonable where there was no evidence that the professional degree was a second-level or graduate degree. In *Mahouri v Canada (Citizenship and Immigration)*, 2013 FC 244 Justice Michael Manson upheld a refusal of a visa officer to issue a visa where the applicant held a Doctorate Degree of Medicine from Shiraz University of Medical Sciences after eight years of study and 'specialty' degree following three further years of study at the same university. The applicant's spouse had seven years of study and a "Doctorate of Medical Science" followed by a "specialty" degree involving four additional years of study. The officer in that case found that both degrees were at the bachelors level. Similarly, in *Rabiee v Canada (Minister of Citizenship and Immigration)*, 2011 FC 824, Justice Michel Beaudry concluded that a medical degree may reasonably be considered a first-level degree in the absence of clear evidence showing that it qualifies as graduate studies.

Requirement for a Fairness Letter

[21] There was no need for the Visa Officer to provide a fairness letter to the applicant as he bears the onus to establish that he meets the criteria for entry. The question as to whether an applicant has the relevant experience, training or education and requisite certificates as required by the *Regulations* is based directly on the requirements of the legislation. It is therefore up to the applicant to provide sufficient evidence to prove that he meets all of the pre-requisites: *Chen v Canada (Citizenship and Immigration)*, 2011 FC 1279, para 22.

[22] Therefore, I would dismiss this application for judicial review.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no question for certification.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4470-12
STYLE OF CAUSE:	**MOHAMMADSADEGH MOHAGHEGHZADEH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, Ontario
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