

Federal Court



Cour fédérale

Date: 20130801

Docket: IMM-8703-12

Citation: 2013 FC 835

Montréal, Quebec, August 1, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

MOHAMMAD MAHABUBUR RAHMAN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Mr. Mohammad Mahabubur Rahman's application for permanent residence as a member of the economic class [application] was refused by an Immigration Officer who did not find that he had the ability to become economically established in Canada in application of subsection 12(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], as he obtained 62 points out of the 67 required.

[2] The Applicant seeks judicial review of that decision, arguing that: (i) the selection criteria for the federal skilled worker [FSW] class under subsections 75(1) and 76(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] entitled him to a greater number of points with respect to education and work experience; (ii) the Officer did not give him a fair opportunity to contradict the outcome of a fraud investigation that was not properly disclosed to him; and (iii) the Officer should have conducted a substituted evaluation under subsection 76(3) of the Regulations since the number of points awarded to him was not a sufficient indicator of his ability to become economically established in Canada.

II. Background

[3] The Applicant is a 36-year-old citizen of Bangladesh. He gave evidence of the following educational credentials: (i) a Secondary School Certificate [SSC] from the Board of Intermediate and Secondary Education of Dhaka, dated July 31, 1993; (ii) a Higher Secondary Certificate [HSC] from the Board of Intermediate and Secondary Education of Dhaka, dated July 1995; (iii) a Bachelor of Science from the National University of Bangladesh; (iv) a Master of Science in Mathematics from the National University of Bangladesh; (v) a Dental Office and Chairside Assistant diploma from CDI College, dated November 3, 2006; and (vi) a Business Administration in International Trading diploma from Evergreen College, dated November 2008.

[4] According to the Applicant's transcripts, the duration of his Bachelor of Science and Master of Science degrees was 3 years and 1 year, respectively. His application stated that his Bachelor of Science was a 4-year degree and that the duration of the pre-university SSC and HSC programs was 12 years, for a total of 16 years.

[5] The Applicant worked as a mathematics instructor at Polygon English Academy [Polygon], part-time from January 22, 2000 to May 2002, and full-time from May 2, 2002 to May 2004. As proof of employment, he presented documents allegedly issued by the Bangladesh Income Tax Office and by Polygon. Offers of employment from Polygon, dated January 25, 2000 and April 25, 2002, state that the Applicant was required to work 26 hours per week as a part-time instructor and 40 hours per week as a full-time instructor.

[6] In August 2004, the Applicant came to Canada on successive study permits and made his application on November 12, 2008.

[7] On May 9, 2010, the High Commission of Canada in Dhaka found that the Applicant's tax documents were fraudulent because: (i) they were issued and signed on January 27, 2010, by an employee who left his position at the tax office on February 24, 2009; (ii) he was not a taxpayer in Bangladesh or was not issued a taxpayer number until January 28, 2010; and (iii) the wet seal on the income tax documents did not match the wet seal used by Bangladesh tax authorities.

[8] On May 9, 2010, an agent of the High Commission went to Polygon to confirm the Applicant's work experience. He learned that, before 2005, Polygon was a coaching centre, not an educational institution.

[9] As a result of that investigation, the Officer notified the Applicant that his tax documents and employer's documents were fraudulent. On May 23, 2012, the Applicant, through his counsel,

sought clarification as the “letter [did] not make it clear to [him] exactly what information has been verified, when, by whom and by what means, and what exactly (what part of the information or documents) is deemed to be ‘fraudulent’ ”.

[10] The Applicant also provided a letter from Polygon confirming his work experience as a part-time instructor from January 2000 to May 2002 and as a full-time instructor from May 2002 to May 2004.

[11] The agent of the High Commission made a second site visit to Polygon, who confirmed that prior to 2005, Polygon was a coaching centre and not a school.

III. Decision under Review

[12] The Officer found that the Applicant could not be selected under subsection 12(2) of the IRPA because the selection criteria in subsection 76(1) of the Regulations did not entitle him to the minimum number of points required for FSWs. The Officer assessed the Applicant under NOC 4131: College and Other Vocational Instructors National Occupation Classification [NOC 4131 class], awarding him 62 points under the selection criteria; 10 for age; 22 for education; 8 for official language proficiency; 17 for work experience; and 5 for adaptability.

[13] The Officer awarded the Applicant 22 points for the education factor pursuant to paragraph 78(2)(e) of the Regulations. According to certificates provided by the Applicant, the program of study for his Master of Science degree in Bangladesh only consisted of a total of 16 years of study: 12 years of pre-university study; 3 years of study for a bachelor’s degree; and 1 year of study for a

master's degree. Consequently, he was ineligible for 25 points under paragraph 78(2)(f) of the Regulations, which requires at least 17 years of completed full-time or full-time equivalent studies.

[14] The Applicant's two years of work experience at Polygon from May 2002 to May 2004 merited 17 points for work experience under paragraph 80(1)(b) of the Regulations. The Officer did not award the Applicant points for his previous part-time work as he did not provide evidence on the number of hours of work he completed or indicate that he had performed work at the college or vocational level. Nor did the Officer award him points for work since 2004 as he did not provide evidence of other work experience at NOC skill type 0 or skill level A or B.

[15] As the Applicant does not contest the way the other selection criteria were assessed by the Officer, there is no need to summarize his findings for the purpose of the present reasons.

IV. Issues

- 1) Did the Officer assess the education factor reasonably?
- 2) Did the Officer assess the work experience factor reasonably?
- 3) Did the Officer breach the duty of procedural fairness?
- 4) Does the decision raise a reasonable apprehension of bias?

V. Analysis

Standard of review

[16] A visa officer's assessment of a permanent resident application under the FSW class involves questions of mixed law and fact that are reviewable on the reasonableness standard

(*Mahouri v Canada (Minister of Citizenship and Immigration)*, 2013 FC 244, [2013] FCJ No 278 at para 11). The same standard applies to a decision to exercise the discretion to conduct a substituted evaluation under subsection 76(3) (*Eslamieh v Canada (Minister of Citizenship and Immigration)*, 2008 FC 722, [2008] FCJ No 909 [*Eslamieh*]). However, whether a decision raises a reasonable apprehension of bias is assessed on the correctness standard (*Azziz v Canada (Minister of Citizenship and Immigration)*, 2010 FC 663, [2010] FCJ No 767).

Assessment of the education factor

[17] The Applicant argues that he was entitled to additional points for education. In his view, paragraph 78(2)(f) of the Regulations entitled him to 25 points because he had a university educational credential at the master's level and a total of 19 years of completed full-time or full-time equivalent studies. In the alternative, he asserts that subsection 78(4) of the Regulations required the Officer to award the same number of points he would be awarded if he had satisfied both requirements for paragraph 78(2)(f). Citing *McLachlan v Canada*, 2009 FC 975, [2009] FCJ No 1183 [*McLachlan*], he argues that subsection 78(4) required the Officer to award 25 points for his master's degree as if he satisfied the length of study requirement in paragraph 78(2)(f).

[18] For the reasons that follow, I am of the opinion that the Officer's finding that the Applicant did not establish that he met the duration of study requirement under paragraph 78(2)(f) is reasonable (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[19] Subsection 78(4) did not require the Officer to award the Applicant the points he would have been entitled to as if he had he satisfied the duration of study requirement. Paragraph 78(2)(f)

awards 25 points to applicants who demonstrate that they have: (i) a university credential at the master's or doctoral level; and (ii) a total of at least 17 years of completed full-time or full-time equivalent studies.

[20] While the Applicant has a Master's degree in mathematics, he did not satisfy the duration of study requirement. Based on the record, the Officer could reasonably determine that he had completed only 16 years of full-time or full-time equivalent studies. First, he consistently stated in his application materials that he completed 12 years of pre-university studies. Second, while he stated that his bachelor's and master's degrees were completed in 4 years and 1 year, respectively, the Officer could reasonably rely on his National University of Bangladesh transcripts, which stated that he completed his bachelor's degree in 3 years and his master's in 1 year. Third, his studies at CDI College and Evergreen College cannot be included in assessing the duration of study requirement as the Officer was not permitted to award points for years of full-time or full-time equivalent studies that did not contribute to his Master's degree (*Hasan v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 339, [2011] FCJ No 1729 at para 56 [*Hasan*]). Since the Applicant could only demonstrate that he had 16 years of study, he did not meet the duration of study requirement under paragraph 78(2)(f) of the Regulations.

[21] Subsection 78(4) does not assist the Applicant. It provides, when applied to the Applicant's situation, that since he has a master's educational credential under paragraph 78(2)(f) but not a total of at least 17 years of full-time or full-time equivalent studies, then the Officer shall award the applicant the same number of points as the same number of years of completed full-time or full-time equivalent studies set out in the paragraph or subparagraph.

[22] The Applicant cites *McLachlan*, above, for the proposition that subsection 78(4) required the Officer to award him the same number of points as if he had satisfied paragraph 78(2)(f).

[23] In *Hasan*, above, the Federal Court of Appeal held that a decision-maker could reasonably award 22 points under subparagraph 78(2)(e)(ii) of the Regulations where the applicants had two master's degrees but "were only credited with 16 years of full-time studies with respect to their master's degree[s]" (at paras 2, 16, 21, and 55). *Hasan* overruled *McLachlan*, concluding that subsection 78(4) did not entitle applicants with educational credentials who fail to meet the duration of study requirement to the full point allocation for their educational credential. The Federal Court of Appeal clearly instructed this Court not to follow *McLachlan* as it was "wrongly decided" (at para 50) and "fatally flawed" (at para 52).

Assessment of the work experience factor

[24] In terms of assessing the reasonableness of the decision, the issue of the education points awarded to the Applicant is determinative. In the absence of an award of further points under paragraph 78(2)(f), the Applicant could not attain the minimum of 67 points, even if he were entitled to full points under the work experience factor. Even assuming that the assessment of the Applicant's work experience is unreasonable, it could not be determinative of his application. An unreasonable finding must be determinative in order to be sufficient to return a decision for redetermination (*Lopez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1444, [2012] FCJ No 1567 at para 9).

[25] The same can be said with respect to the alleged apprehension of bias on the Officer's part for not having given the Applicant the opportunity to contradict the outcome of the investigation report. As it only concerns the Applicant's work experience, it has no impact on the Officer's finding that the Applicant could only be awarded 22 points for education.

[26] Consequently, the Court will not deal with the second and forth issues raised above.

The necessity to conduct a substituted evaluation

[27] The Applicant claims the Officer breached the duty of fairness in not conducting a substituted evaluation under subsection 76(3) of the Regulations as the number of points awarded to him was not a sufficient indicator of his ability to become economically established in Canada. He submits that *Jogiat v Canada (Minister of Citizenship and Immigration)*, 2009 FC 815, [2009] FCJ No 1518 required the Officer to explain why a substituted evaluation was not warranted.

[28] The Officer was not required to conduct a substituted evaluation under subsection 76(3). Justice Mosley, in *Eslamieh*, above at para 4, held that a decision-maker need not consider a substituted evaluation "unless specifically requested to do so" (see also *Chowdhury v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1315, [2011] FCJ No 1605 at para 35). Since the Applicant did not request the Officer to exercise his discretion pursuant to subsection 76(3), the decision is not unreasonable on that ground.

VI. Conclusion

[29] For all of the foregoing reasons, the Applicant's application for judicial review should be dismissed. The parties did not propose any question of general importance for certification and none arises from this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. No question of general importance is certified; and
3. No costs are granted.

“Jocelyne Gagné”

Judge

SCHEDULE

Relevant Legislative Provisions

The following legislative provisions of the Regulations are relevant:

<p>76. (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>76. (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) — n'est pas un indicateur suffisant de 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>78. (2) A maximum of 25 points shall be awarded for a skilled worker's education as follows:</p> <p>...</p> <p>(e) 22 points for</p> <p>...</p> <p>(ii) two or more university educational credentials at the bachelor's level and a total of at least 15 years of completed full-time or full-time equivalent studies; and</p>	<p>78.2. (2) Un maximum de 25 points d'appréciation sont attribués pour les études du travailleur qualifié selon la grille suivante :</p> <p>...</p> <p>e) 22 points, si, selon le cas :</p> <p>...</p> <p>(ii) il a obtenu au moins deux diplômes universitaires de premier cycle et a accumulé un total d'au moins quinze années d'études à temps plein complètes ou l'équivalent temps plein;</p>

f) 25 points for a university educational credential at the master's or doctoral level and a total of at least 17 years of completed full-time or full-time equivalent studies.

f) 25 points, s'il a obtenu un diplôme universitaire de deuxième ou de troisième cycle et a accumulé un total d'au moins dix-sept années d'études à temps plein complètes ou l'équivalent temps plein.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-8703-12

STYLE OF CAUSE: MOHAMMAD MAHABUBUR RAHMAN v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 30, 2013

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

DATED: August 1, 2013

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