Federal Court  Cour fédérale

Date: 20091223

Docket: IMM-2604-09

Citation: 2009 FC 1312

Ottawa, Ontario, December 23, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

SALEEM AHMAD KHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Khan applied for a permanent resident visa as a federal skilled worker. The *Immigration and Refugee Protection Regulations* set out various selection criteria, one of which is proficiency in the official languages of Canada. Section 79 thereof calls upon a skilled worker to identify English or French as his or first Canadian official language. Mr. Khan only listed English, and professed no proficiency in French. The application needs to be accompanied by test results by an accredited

language institution or by other evidence in writing of the applicant's proficiency in his selected language.

[2] An officer at Canada's High Commission in London wrote in October 1, 2008 requesting further documentation by January 1, 2009. For the purposes of his application, Mr. Khan was strongly advised to provide International English Language Testing System (IELTS) test results.

[3] Mr. Khan, a Pakistani citizen, but then based in Dubai, was unable to secure a seat for the exam until February 2009. By letter through his immigration consultant, dated January 27, 2009, but only received by the visa officer February 11, 2009, he requested a 60-day extension. The Officer's CAIPS Notes reflect the request but do not state if the consultant gave a reason. A copy of the letter was not produced. However since an official receipt showing that the exam was only going to take place in February was in the Tribunal Record, it is reasonable to infer that the request was on the basis that he could not sit the exam before then.

[4] At the time the visa officer received the request, his Notes show that he had already made up his mind to dismiss the application on the grounds that Mr. Khan did not have the required 67 points. Without answering the request for an extension of time, he denied Mr. Khan's application. Mr. Khan was awarded 60 points out of the required 67. He was given 0 out of 20 for language proficiency on the grounds that the officer had no benchmark against which to assess his English language ability.

[5] Thereafter Mr. Khan provided test reports which apparently show that he would have received at least 14 points on language. He requested that the matter be reopened but the visa officer refused.

ISSUES

[6] Although it could be said that there are really three decisions in question, the refusal to grant an extension of time, the decision on the merits and the refusal to reopen the matter, the Minister has not raised that point.

[7] As I see it, the first issue is whether the Visa Officer should have rendered a decision on the application for permanent residence in the light of the request for an extension of time so that Mr. Khan would be in a position to provide IELTS results. The second issue is whether the decision on the merits was otherwise reasonable and the third, contingent on either one of the first two, is whether the refusal to reopen the application was unreasonable.

DECISION

[8] In my opinion, both the refusal to grant an extension of time and the decision on the merits of the application were unreasonable and so judicial review will be granted. In the circumstances, it is not necessary to consider whether the visa officer was *functus officio*. The authorities in that regard were recently canvassed by Madam Justice Mactavish in *Kurukkal v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 695, 81 Imm. L.R. (3d) 263.

ANALYSIS

[9] Administrative efficiency is important, and necessary. A three-month delay to provide further documentation was more than fair. Mr. Khan certainly knew by November 2008 that he would not be able to sit the exam until February 2009 and there was absolutely nothing to prevent him from requesting a delay prior to the deadline set by the visa officer.

[10] The greater issue, however, is that of justice between the parties. The visa officer's letter did not state that any request for an extension must be made before January 1, 2009. I draw an analogy to section 18.1(2) of the *Federal Courts Act* which requires that an application for judicial review of a decision of a federal board, commission or tribunal be made within 30 days, or such further time that the Court may fix either before or after the expiration of those 30 days. Certainly the visa officer had the discretion to grant the requested extension. The conclusion I draw is that the request was refused in a fit of pique.

[11] The underlying consideration on an application to extend time is that justice be done. Consideration should be given to the reason for the requested delay and whether there is an arguable case on the merits (*Grewal v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263 (C.A.). Certainly Mr. Khan had a continuing intention to pursue his application, his application had some merit, there is no prejudice to the Minister arising from the delay and a reasonable explanation exists (See *Canada (Attorney General) v. Hennelly* (1999), 244 N.R. 399 (F.C.A.); *Gakar v. Canada (Minister of Citizenship and Immigration)* (2000), 189 F.T.R. 306 at paragraph 29 and following; *Ching-Chu v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 855, 315

F.T.R. 301; and *Pharaon v. Canada (Minister of Citizenship and Immigration),* 2009 FC 276, 80 Imm. L.R. (3d) 115).

[12] Thus the decision arises from procedural unfairness, upon which no deference is owed. However, in any event, the decision on the merits not to award any points for English language ability was unreasonable. Mr. Khan obtained both an undergraduate degree and a Masters of Administration in England, and had worked in Dubai for a number of years in English. The regulation does not require an IELTS Report and so the Visa Officer failed to discharge his duty by not assessing the material which was on hand. The Minister relies on the decision of *Al Turk v. Canada (Minister of Citizenship and Immigration),* 2008 FC 1396 both on the issue of an extension for delay and on the assessment of language proficiency. On the first point there was no evidence in that case that a request for an extension was ever made. In the case at hand there is. In *Al Turk* the applicant had studied in English, but the Court held this did not conclusively establish that he had either a moderate or high level of ability. He could well have passed with only a basic level of English. However, the Court noted in that case that the visa officer was not satisfied that he had studied in an English speaking environment "<u>such as a person having studied in the U.K.</u>" Not only did Mr. Khan study in the U.K., he was awarded 25 out of 25 points for education. It is ludicrous to suggest that someone who has obtained both an undergraduate and a master's degree in England from an English language university has no ability in the English language.

[13] The matter is to be referred back to another visa officer for reassessment on the criteria in place when Mr. Khan made his original application.

ORDER

FOR THE REASONS GIVEN;

THIS COURT ORDERS that

1. This application for judicial review is granted.
2. The visa officer's decision is set aside.
3. The matter is referred back to another visa officer for a fresh determination.
4. There is no serious question of general importance to certify.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2604-09
STYLE OF CAUSE:	*Saleem Ahmad Khan v. MCI*
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 17, 2009
REASONS FOR ORDER:	HARRINGTON J.
DATED:	December 23, 2009

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