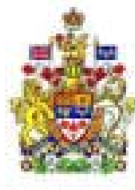
Federal Court of Appeal



Cour d'appel fédérale

Date: 20110203

Docket: A-149-10

Citation: 2011 FCA 40

CORAM: **NOËL J.A.**
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

ZAFAR SHAHID

Respondent

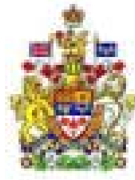
Heard at Toronto, Ontario, on January 11, 2011.

Judgment delivered at Ottawa, Ontario, on February 3, 2011.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: PELLETIER J.A.
TRUDEL J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal by the Minister of Citizenship and Immigration (the Minister) against a decision of O'Reilly J. of the Federal Court (the Applications Judge) wherein he granted the application for judicial review brought by Mr. Zafar Shahid (the respondent) against a decision of an immigration officer denying his application for permanent residency as a skilled worker.

[2] Subsection 12(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 provides that a foreign national may be selected for permanent residency as a member of the economic class

on the basis of his ability to become economically established in Canada. The *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the IRPR) set out the applicable criteria for a Federal Skilled Worker Class as follows (subsection 75(1)) :

… persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada and who intend to reside in a province other than the Province of Quebec.	[…] personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada, qui sont des travailleurs qualifiés et qui cherchent à s'établir dans une province autre que le Québec.

[3] In order to determine whether a skilled worker will be able to become economically established in Canada, the IRPR identify various criteria with which a specific number of points is associated; an applicant must be awarded a minimum of 67 points to qualify for the Federal Skilled Worker Class.

[4] In the present case, the respondent was awarded 63 points. The immigration officer did not award any points under the adaptability criteria for the respondent's spouse's educational credentials. The respondent claims that he should have been awarded the 4 available points, which would have given him the minimum requirement of 67 points, because his spouse meets the educational requirement of the IRPR.

[5] The Applications Judge agreed and quashed the decision of the immigration officer on the basis that his refusal to award the 4 points was unreasonable.

<u>THE RELEVANT PROVISIONS OF THE IRPR</u>

[6] In order for the respondent to be entitled to the 4 points, his spouse had to meet the requirements set out in subparagraph 78(2)(*d*)(ii) of the IRPR:

a two-year university educational credential at the bachelor's level and a total of at least 14 years of completed full-time or full-time equivalent studies;	il a obtenu un diplôme universitaire de premier cycle nécessitant deux années d'études et a accumulé un total d'au moins quatorze années d'études à temps plein complètes ou l'équivalent temps plein;

[7] The expression "educational credential" is defined in section 73 as follows :

"educational credential" means any diploma, degree or trade or apprenticeship credential issued on the completion of a program of study or training at an educational or training institution recognized by the authorities responsible for registering, accrediting, supervising and regulating such institutions in the country of issue.	« diplôme » Tout diplôme, certificat de compétence ou certificat d'apprentissage obtenu conséquemment à la réussite d'un programme d'études ou d'un cours de formation offert par un établissement d'enseignement ou de formation reconnu par les autorités chargées d'enregistrer, d'accréditer, de superviser et de réglementer de tels établissements dans le pays de délivrance de ce diplôme ou certificat.

[8] The term "studies" is defined in section 1 as follows :

"studies" means studies undertaken at a university or college, or any course of academic, professional or vocational training.	« études » Études dans une université ou un collège ou cours de formation générale, théorique ou professionnelle.

[9] Finally, the definitions of "full-time" and "full-time equivalent" are set out in subsection 78(1) of the IRPR:

The definitions in this subsection apply in this section.

Les définitions qui suivent s'appliquent au présent article.

"full-time" means, in relation to a program of study leading to an educational credential, at least 15 hours of instruction per week during the academic year, including any period of training in the workplace that forms part of the course of instruction.

« équivalent temps plein » Par rapport à tel nombre d'années d'études à temps plein, le nombre d'années d'études à temps partiel ou d'études accélérées qui auraient été nécessaires pour compléter des études équivalentes.

"full-time equivalent" means, in respect of part-time or accelerated studies, the period that would have been required to complete those studies on a full-time basis.

« temps plein » À l'égard d'un programme d'études qui conduit à l'obtention d'un diplôme, correspond à quinze heures de cours par semaine pendant l'année scolaire, et comprend toute période de formation donnée en milieu de travail et faisant partie du programme.

[10] The outcome of this appeal essentially turns on the meaning which is to be attributed to these last two definitions.

<u>THE DECISION UNDER APPEAL</u>

[11] The Applications Judge briefly alluded to the education system in Pakistan. He noted that "external candidates" can obtain a degree without attending classes on a full-time or part-time basis (Reasons at para. 8). In this respect, the evidence shows that external candidates are "not required to attend classes, complete any assigned readings or hand in assignments; [they] simply [have] to write an exam in each subject studied". The requirements to write an examination as an external candidate are: (i) register for a scheduled examination session; (ii) complete the appropriate form; and (iii) pay

the required fees. Once enrolled for an examination, the external candidate can prepare through independent studies or with the assistance of a private tutor (Affidavit of the immigration officer, Appeal Book at p. 584, paras. 4 and 5).

[12] One way of distinguishing an "external candidate" from a "regular" student is through their respective marks sheet. A regular student's marks sheet states, *inter alia*, the program and year in which the examinations were written, the particular school at which the studies were undertaken and the overall result. In contrast, an external candidate's marks sheet identifies the student as such without any indication of a school or affiliated college (*Ibid.* at p. 585, paras. 6 and 7).

[13] The Applications Judge rendered his decision on the basis that the respondent's spouse was an external candidate. He noted that it was clear that she did not meet the definition of "full-time" as she did not provide evidence that she attended classes for 15 hours a week. However, even if she had not achieved 14 years of "full-time studies", the officer had to consider whether she nevertheless met the definition of "full-time equivalent studies". According to the Applications Judge, the "full-time equivalent" requirement can be met whether the respondent's spouse studied on her own or followed a formal course (Reasons at para. 9):

> … Even if she studied elsewhere, or on her own, whether part-time or on an accelerated basis, it seems to me she could meet the definition of "full-time equivalent" if she proved that the degree she obtained would ordinarily take 14 years of full-time study to obtain. Here, the evidence showed that she took exams over the course of two years and obtained a degree that ordinarily takes two years of full-time study to achieve. And she provided proof of twelve years of full-time study preceding her university credential. …

[14] Applying this reasoning, the Applications Judge held that the decision of the immigration officer was unreasonable because the evidence established that the respondent's spouse successfully completed exams and obtained a degree that ordinarily takes two years of full-time study to obtain (Reasons at paras. 7 and 9). As such, the respondent was entitled to the 4 points. The Applications Judge therefore allowed the application for judicial review and referred the matter to a different immigration officer with instructions that it be reconsidered in accordance with the regulatory requirements as he construed them.

[15] The Applications Judge certified the following question of general importance:

> Does the definition of "full-time equivalent" in [subsection] 78(2) of the [IRPR] merely require an assessment of the period of time that would have been needed to achieve a particular educational credential on a full-time basis, or does it also require a consideration of the nature and quantity of instruction the individual receives?

<u>POSITION OF THE PARTIES</u>

[16] The appellant submits that the Applications Judge erred in holding that the definition of "full-time equivalent" applied on the facts of this case. The appellant submits that in order for this definition to apply, the respondent had to provide evidence that his spouse studied at an educational institution for a long period on a part-time basis or that she studied for a shorter more intense period to complete her studies. According to its wording, the definition has no other application.

[17] It follows that the Applications Judge could not rely on this definition in order to find that the spouse's diploma counted towards the 14 years of study she needed to complete before the respondent could be awarded the 4 points for her education.

[18] The respondent for his part takes the position that the Applications Judge properly construed and applied the notion of "full-time equivalent". According to the respondent "full-time equivalent" includes "independent study" as well as "part-time studies" and the Applications Judge properly applied this definition on the facts of this case.

[19] In the alternative, the respondent submits that his spouse did in fact attend courses and complete assignments at Sir Syed College – an affiliate of the University of Karachi – in order to obtain her educational credential. In support of this submission the respondent points to his spouse's marks sheet, which clearly states that she took Islamic studies and education studies and mentions "Paper I" in each case. According to the respondent, it is reasonable to infer from this that the respondent's spouse completed both "coursework" and exams as she had to perform various assignments in order to obtain her credential (Memorandum of the respondent at para. 23).

ANALYSIS AND DECISION

[20] Dealing first with this last issue, I note that the Applications Judge did not accept that the respondent's spouse followed courses at a recognized educational institution or performed assignments, as he rendered his decision on the basis that she was an external candidate. I can detect no error in this regard.

[21] The mention of the word “paper” on the spouse’s marks sheet does not necessarily mean that she performed assignments or did “coursework” as the respondent suggests. The word can also mean “a set of questions to be answered … in an examination” (Canadian Oxford Dictionary, 2nd Edition, Oxford University Press, 2004). Counsel was unable to demonstrate why the word “paper” on the marks sheet should be construed as she suggests.

[22] Furthermore, when the spouse’s marks sheet is compared to that of the respondent who attended courses at the National Government College, one notes that, in contrast to her husband, she is labelled as an external candidate and no mention is made as to any institution she might have attended.

[23] The respondent also relied on a letter from the Registry of the University of Karachi dated January 2nd, 2008 which certifies that the degree obtained by the respondent’s spouse in 1985 “is equivalent to university degree of two years and 14 years of full-time education/studies”.

[24] I do not believe that this letter can be of assistance to the respondent as it is apparent that it was framed so as to opine on the very issue that is to be decided in the present case.

[25] The central issue in this appeal turns on the interpretation of the definition of “full-time equivalent”. This is a pure question of statutory construction which stands to be decided on a standard of correctness. In ascertaining the meaning and effect of this definition, the Court must bear in mind that (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para.21):

> …, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[26] It is common ground that the definition of "full-time equivalent" applies to those who obtain an educational credential through "part-time or accelerated studies". The question is whether the definition also extends to those who successfully complete their studies on their own through what the parties have described as "self-study" or what I believe is more appropriately described as "independent study".

[27] The Applications Judge answered this question in the affirmative. He held that the definition applies regardless of the manner in which the degree is obtained (Reasons at para. 9).

[28] On the face of it, the definition of "full-time equivalent" is restricted to persons engaged in "part-time or accelerated studies". It simply provides that such persons will, upon obtaining an "educational credential" (*i.e.* a university degree in this case), be credited with the number of hours of instruction that would have been required to obtain the same degree on a full-time basis. When, as is the case here, a university degree is involved, the term "studies" is defined as those "undertaken at a university" (see the definition of "studies" quoted at para. 8, above).

[29] Thus for example, a person who engages in part-time studies and obtains a university degree after two years of studies, in circumstances where the same degree can be obtained on a full-time basis after one year, will be credited with having been engaged in a program of study of "at least 15

hours of instruction per week" during a single year. Conversely, a person who engages in accelerated studies and obtains a university degree after one year of studies, in circumstances where the same degree is obtained on a full-time basis over the course of two years, is credited with having been engaged in a program of study of "at least 15 hours of instruction per week" over two years.

[30] The net result is that a person who obtains a degree through "part-time or accelerated studies" is deemed to have studied the equivalent number of hours as someone who obtained the same degree on a full-time basis. Significantly, no other form of equivalency is created by the definition.

[31] The construction given by the Applications Judge ignores this limitation. There is in this case no discrepancy in terms of time studied as, based on his own finding, the respondent's spouse took two years to obtain a degree that ordinarily takes two years of full-time study to achieve (Reasons at para. 9). It follows that there were no hours to equate. The equivalence identified by the Applications Judge goes to the mode or manner of studies rather than the time required to complete them. The definition does not operate this way.

[32] Beyond this, the interpretation which the Applications Judge proposes does not take into account the defined meaning of the word "studies" which, in the case of a university degree means those "undertaken at a university". Nor does it take into account the definition of "educational credential" in section 73 (see para. 7 above) which means "diploma, degree or trade or apprenticeship credential issued on the completion of a program of study … at an educational or

training institution recognized by the authorities …”. Based on the Applications Judge’s reasoning, the definition of “full-time equivalent” would apply whether or not these requirements are met.

[33] On a correct construction of the definition of “full-time equivalent”, the respondent’s spouse failed to meet the two requirements of subparagraph 78(2)(*d*)(ii) in that she did not obtain an education credential as defined or achieve 14 years of full-time or full-time equivalent studies. It follows that the immigration officer came to the proper conclusion and the Applications Judge erred in intervening.

[34] I would therefore allow the appeal, set aside the decision of the Applications Judge, restore the decision of the immigration officer and answer the certified question as follows:

> The definition of “full-time equivalent” applies when there is a discrepancy between the time in which a particular “educational credential” (as defined) is obtained by an individual and the time required to obtain the same credential on a full-time basis by reason of having followed part-time or accelerated studies at an educational or training institution recognized by the authorities. It follows that the definition requires a consideration of both the nature and quantity of instruction received by the individual.

“Marc Noël”
J.A.

“I agree
J.D. Denis Pelletier J.A.”

“I agree
Johanne Trudel J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-149-10

(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE O'REILLY OF THE FEDERAL COURT, DATED MARCH 4, 2010, DOCKET NO. IMM-552-09.)

STYLE OF CAUSE:	MINISTER OF CITIZENSHIP AND IMMIGRATION v. ZAFAR SHAHID
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 11, 2011
REASONS FOR JUDGMENT BY:	Noël J.A.
CONCURRED IN BY:	Pelletier J.A. Trudel J.A.
DATED:	February 3, 2011

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