Federal Court of Appeal

Cour d'appel fédérale

Date: 20110602

Docket: A-449-10

Citation: 2011 FCA 187

CORAM: **SEXTON J.A.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

JIGARKUMAR PATEL

Respondent

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

Judgment delivered at Ottawa, Ontario, on June 2, 2011.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: SEXTON J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The respondent, Jigarkumar Patel, applied for permanent residence in Canada as a member of the federal skilled worker class. He claimed 74 selection points, including five points for adaptability based upon his two years of Canadian post-secondary study. A visa officer refused Mr. Patel's application for permanent residence on the basis that his application merited only 63 selection points - four less than the required 67 points. The visa officer awarded no selection points for adaptability. Had the officer awarded the requested five points for adaptability, Mr. Patel would have had the required number of points to qualify as a member of the federal skilled worker class.

[2] Mr. Patel applied to the Federal Court for judicial review of the visa officer's decision. A Judge of the Federal Court, in reasons cited as 2010 FC 1025, 375 F.T.R. 115, allowed the application and remitted the matter to a different visa officer. The Judge certified the following serious question of general importance:

> In assessing adaptability under s. 83 of the *Immigration and Refugee Protection Regulations*, should a visa officer aggregate programs of study that do not each constitute two years of full-time study of at least two years' duration at a post-secondary institution in Canada and award points if the total period of study amounts to or exceeds two years of full-time study at one or more post-secondary institutions?

[3] The Minister now appeals to this Court from the decision of the Federal Court. For the reasons that follow, I would allow the appeal, dismiss Mr. Patel's application for judicial review and answer the certified question in the negative.

1. Factual Background

[4] Mr. Patel is a citizen of India who holds a Bachelor of Science degree from a university in India. He came to Canada in 2004 on a study permit. From February 2005 to June 2006 he attended three semesters as a full-time student at the Canadian Career College. In June 2006 he was awarded a Diploma in International Business Management from that institution. During the summer of 2007 Mr. Patel attended the Xincon Technology College of Canada as a full-time student, studying computer systems technology for one semester. While he obtained several course credits, Mr. Patel did not complete the 118 week program of study.

2. Legislative Framework

[5] Before reviewing the decisions of the visa officer and the Federal Court, it is helpful to set out the legislation relevant to this appeal.

a. *The Immigration and Refugee Protection Act*

[6] Section 12 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), found in Part 1, Division 1 of the Act, deals with the selection of permanent residents. Subsection 12(2) provides that a "foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada."

[7] Subsection 14(1) goes on to provide that regulations may be enacted for any matter relating to Part 1, Division 1 of the Act. Of relevance to this appeal is paragraph 14(2)(*a*) of the Act which states:

14. (2) The regulations may prescribe, and govern any matter relating to, classes of permanent residents or foreign nationals, including the classes referred to in section 12, and may include provisions respecting (a) selection criteria, the weight, if any, to be given to all or some of those criteria, the procedures to be followed in evaluating all or some of those criteria and the circumstances in which an officer may substitute for those criteria their evaluation of the likelihood of a foreign national's ability to become economically established in Canada; [emphasis added]	14. (2) Ils établissent et régissent les catégories de résidents permanents ou d'étrangers, dont celles visées à l'article 12, et portent notamment sur : a) les critères applicables aux diverses catégories, et les méthodes ou, le cas échéant, les grilles d'appréciation et de pondération de tout ou partie de ces critères, ainsi que les cas où l'agent peut substituer aux critères son appréciation de la capacité de l'étranger à réussir son établissement économique au Canada; [Non souligné dans l'original.]

b. The Regulations

[8] Turning to the Regulations, paragraph 70(2)(*b*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations) describes the economic class of immigrants to include the federal skilled worker class. This is the class in which Mr. Patel applied for permanent residence.

[9] Paragraph 72(1)(*d*) of the Regulations states that a foreign national in Canada becomes a permanent resident if, among other things, it is established that "they meet the selection criteria and other requirements applicable" to the class in which they apply for permanent residence.

[10] Dealing specifically with the federal skilled worker class, subsection 75(1) of the Regulations provides:

75. (1) For the purposes of subsection 12(2) of the Act, the federal skilled worker class is hereby prescribed as a class of 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. [emphasis added]	75. (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des travailleurs qualifiés (fédéral) est une catégorie réglementaire de 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. [Non souligné dans l'original.]

[11] As subsection 12(2) of the Act and subsection 75(1) of the Regulations specify, central to membership in the economic class, including the federal skilled worker class, is the concept of "ability to become economically established in Canada."

[12] Subsection 76(1) of the Regulations enumerates the criteria to be applied in order to assess whether a member of the federal skilled worker class will become economically established in Canada. It states:

76. (1) For the purpose of determining whether a skilled worker, as a member of the federal skilled worker class, will be able to become economically established in Canada, they must be assessed on the basis of the following criteria:	76. (1) Les critères ci-après indiquent que le travailleur qualifié peut réussir son établissement économique au Canada à titre de membre de la catégorie des travailleurs qualifiés (fédéral) :
(a) the skilled worker must be awarded not less than the minimum number of required points referred to in subsection (2) on the basis of the following factors, namely,	a) le travailleur qualifié accumule le nombre minimum de points visé au paragraphe (2), au titre des facteurs suivants :
(i) education, in accordance with section 78,	(i) les études, aux termes de l'article 78,
(ii) proficiency in the official languages of Canada, in accordance with section 79,	(ii) la compétence dans les langues officielles du Canada, aux termes de l'article 79,
(iii) experience, in accordance with section 80,	(iii) l'expérience, aux termes de l'article 80,
(iv) age, in accordance with section 81,	(iv) l'âge, aux termes de l'article 81,
(v) arranged employment, in accordance with section 82, and	(v) l'exercice d'un emploi réservé, aux termes de l'article 82,
(vi) adaptability, in accordance with section 83; and	(vi) la capacité d'adaptation, aux termes de l'article 83;
(b) the skilled worker must	b) le travailleur qualifié :
(i) have in the form of transferable and available funds, unencumbered by debts or other obligations, an amount equal to half the minimum necessary income applicable in respect of the group of persons consisting of the skilled worker and their family members, or	(i) soit dispose de fonds transférables — non grevés de dettes ou d'autres obligations financières — d'un montant égal à la moitié du revenu vital minimum qui lui permettrait de subvenir à ses propres besoins et à ceux des membres de sa famille,
(ii) be awarded the number of points referred to in subsection 82(2) for arranged employment in Canada within the meaning of subsection 82(1). [emphasis added]	(ii) soit s'est vu attribuer le nombre de points prévu au paragraphe 82(2) pour un emploi réservé au Canada au sens du paragraphe 82(1). [Non souligné dans l'original.]

[13] Subsection 76(2) of the Regulations requires the appellant Minister to fix the minimum number of points required of a skilled worker on the basis of three enumerated factors. It is agreed that Mr. Patel was required to obtain not less than 67 points.

[14] With respect to the selection criterion of adaptability, paragraph 83(1)(*b*) and subsection 83(3) of the Regulations are of central relevance to this appeal. They provide:

83. (1) A maximum of 10 points for adaptability shall be awarded to a skilled worker on the basis of any combination of the following elements:	83. (1) Un maximum de 10 points d'appréciation sont attribués au travailleur qualifié au titre de la capacité d'adaptation pour toute combinaison des éléments ci-après, selon le nombre indiqué :
[…]	. . .
(*b*) for any previous period of study in Canada by the skilled worker or the skilled worker's spouse or common-law partner, 5 points;	*b*) pour des études antérieures faites par le travailleur qualifié ou son époux ou conjoint de fait au Canada, 5 points;
[…]	. . .
83. (3) For the purposes of paragraph (1)(*b*), a skilled worker shall be awarded 5 points if the skilled worker or their accompanying spouse or accompanying common-law partner, by the age of 17 or older, completed a program of full-time study of at least two years' duration at a post-secondary institution in Canada under a study permit, whether or not they obtained an educational credential for completing that program. [emphasis added]	83. (3) Pour l'application de l'alinéa (1)*b*), le travailleur qualifié obtient 5 points si, à la date de son dix-septième anniversaire ou par la suite, lui ou, dans le cas où il l'accompagne, son époux ou conjoint de fait a complété avec succès un programme au titre d'un permis d'études — que ce programme ait été couronné ou non par un diplôme — qui a nécessité au moins deux ans d'études à temps plein dans un établissement d'enseignement postsecondaire au Canada. [Non souligné dans l'original.]

3. The Decision of the Visa Officer

[15] As set out above, the visa officer awarded no points for adaptability based upon Mr. Patel's period of post-secondary study in Canada. The officer's rationale for this was expressed in the following way in the refusal letter:

> […] No Adaptability points for your prior study in Canada have been assessed as you have not studied at a post-secondary institution in Canada in a program of full-time study of at least two years duration; you completed a one year program at Canada Career College and have presented evidence you attended one semester at Xincon College.

[16] The visa officer's Computer Assisted Immigration Processing System notes contain the following expanded explanation for the officer's decision:

> - PA has studied in Cda for the following
> 1) a one (1) yr Diploma program in International Business Mgmt at Canadian Career College (07/Feb/2005) to 23/Jun/2006); transcripts (which have been verified by the issuing school) and a copy of diploma on file
> 2) a Computer Systems Technology program at Xincon College in Scarborough; transcript on file shows PA attended for the Summer/07 semester; I note these transcripts are not/not dated, but were notarized on 09/Jan/2008 (by an Ontario based notary) : : no/no further evidence of study at, or graduation from, this school has been presented : :
> To have 5 points assessed, PA must provide evidence he has studied at a (i.e. one) post-secondary Cdn institution in a program of full-time study of at least two yrs' duration; PA has completed a one yr program at one school and appears to have attended one semester at a different school : : furthermore, I note PA took two disparate, distinct programs and did not/not transfer from one institution to another into a similar program and with transfer credits : : PA has presented transcripts he had notarized in Jan/09 and I understand this to mean these transcripts show the extent of his studies at Xincon College as it would seem unreasonable to have notarized, and then submit, transcripts that do not show the complete scholastic history at a particular school : :
>
> I am not/not satisfied, based on the evidence before me, to assess 5 points for prior study in Cda : : [emphasis added]

4. The Decision of the Federal Court

[17] The Judge characterized the issues before him to be the standard of review and whether the visa officer erred in his interpretation of section 83 of the Regulations.

[18] The Judge rejected the Minister's argument that the appropriate standard of review to be applied to the officer's decision was reasonableness. The Judge viewed the primary basis of the visa officer's decision to be his interpretation of section 83 of the Regulations. This was, in the view of the Judge, a question of law which should be reviewed on the standard of correctness. The question of whether Mr. Patel completed two years of study as required by section 83 was, in the Judge's view, a question of mixed fact and law which attracted review on the standard of reasonableness.

[19] Turning to the visa officer's interpretation of section 83 of the Regulations, the Judge found the officer interpreted section 83 so as to require full-time attendance for two years in a single academic program at a single accredited institution. The Judge was satisfied that this interpretation was wrong in law.

[20] The Judge's reasons for this conclusion were as follows:

> 19. The Minister argues that s 83 refers throughout to the singular (a program; a post-secondary institution; that program) and that its ordinary meaning must therefore be confined to a single two-year academic program at one institution.
>
> 20. Counsel for Mr. Patel points to ss 33(2) of the *Interpretation Act*, R.S., 1985, c. I-21 which dictates that "words in the singular include the plural and words in the plural include the singular". Accordingly, the references in s 83 to the singular must be taken to include "programs", "institutions", "study permits" and "those programs": see *Canada v Ward*, [1993] 2 SCR 689, 103 DLR (4th) 1 at para 90. It

> seems to me that this argument has considerable merit and is also in keeping with a purposive approach to the interpretation of s 83.
>
> 21. Consistent with the statutory language used, both parties agree that the acquisition of an academic credential is not a requirement for the award of adaptability points. This is in harmony with s 78 of the Regulations where points are awarded for academic credentials. Presumably one's adaptability is not dependent upon academic achievement but rather on the basis that one be enrolled in full-time studies at an accredited institution, or institutions for at least two years. I can identify no policy rationale for the narrow approach advanced by the Minister. Taking a succession of academic programs at one or more accredited institutions would not defeat or detract from the statutory purpose of recognizing a person's adaptability, provided that the other statutory pre-requisites are met. To entirely discount the value of Mr. Patel's pursuit of business and computer skills on such a basis seems perverse and not in keeping with the statutory object of recognizing a person's adaptability in Canada. [emphasis added]

5. The Issues

[21] In my view, the issues to be determined on this appeal are:

i. What is the applicable standard of review?

ii. Did the Judge err in setting aside the decision of the visa officer?

6. Consideration of the Issues

i. What is the applicable standard of review?

[22] I agree with the appellant's submission that, on an appeal from a decision of the Federal Court on an application for judicial review, the standard of appellate review is whether the Judge of the Federal Court selected the appropriate standard of review and then applied it correctly. See: *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, [2009] 4 C.T.C. 123 at paragraph 18.

[23] As to the standard of review selected by the Judge, at paragraph 10 of his reasons the Judge wrote:

> 10. I do not agree with the Minister's assertion that the principal issue presented by this application must be assessed on the standard of reasonableness. The primary basis for the visa officer's decision involved the interpretation of s 83 of the IRPA Regulations. This raises an issue of law which must be reviewed on the standard of correctness: see *Sapru v Canada*, 2010 FC 240, 2010 CarswellNat 455 (WL) at paras 15 and 16; *Charalampis v Canada*, 2009 FC 1002, 353 FTR 24 at para 34; and *Angeles v Canada*, 2009 FC 744, 2009 CarswellNat 2506 (WL) at para 16. I accept that the issue of whether Mr. Patel completed two years of study as required by s 83 involves an issue of mixed fact and law attracting a standard of review of reasonableness.

[24] The Minister, relying upon *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraphs 54 and 59, *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 44, and *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, 410 N.R. 127 at paragraph 34, argues that the visa officer's interpretation of the Regulations should have been reviewed on the standard of reasonableness. The Minister distinguishes this Court's decision in *Shahid v. Canada (Minister of Citizenship and Immigration)*, 2011 FCA 40, [2011] F.C.J. No. 160 on the ground the case was heard prior to the release of the decision of the Supreme Court of Canada in *Celgene*. In *Shahid* this Court found that the interpretation of "full-time equivalent" as used in the Regulations was a pure question of statutory construction which should be decided on the standard of correctness.

[25] The respondent replies that the standard of review is correctness and that the Judge correctly found the officer's interpretation of the Regulations to be wrong.

[26] As explained by the Supreme Court of Canada in *Dunsmuir*, at paragraph 62, the first step in determining the appropriate standard of review is to ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to a particular category of question.

[27] In my view, the jurisprudence has already determined that a visa officer's interpretation of the Act or the Regulations is reviewable on the standard of correctness. See, for example:

(i) *Hilewitz v. Canada (Minister of Citizenship and Immigration)*; *De Jong v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 706 at paragraph 71 where the Supreme Court applied the correctness standard to the interpretation of subparagraph 19(1)(*a*)(ii) of the *Immigration Act*, R.S.C. 1985, c. I-2 by a visa officer. That provision rendered persons inadmissible if "their admission would cause or might reasonably be expected to cause excessive demands on health or social services";

(ii) *dela Fuente v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 186, [2007] 1 F.C.R. 387 where this Court applied the correctness standard to the interpretation of paragraph 117(9)(*d*) of the Regulations by a visa officer and later the Immigration Appeal Division. Paragraph 117(9)(*d*) rendered a foreign national ineligible to be considered a member of the family class by virtue of their relationship to a sponsor if "subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and,

at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined"; and

(iii) *Shahid*, as cited above, at paragraph 25 where this Court applied the correctness standard to the interpretation of the phrase "full-time equivalent" in subsection 78(2) of the Regulations by a visa officer. The interpretative question in *Shahid* concerned an applicant's academic history, and so, for the purposes of a standard of review analysis, presented considerations similar to those presented by the interpretive question in this case.

[28] It follows that the Judge did not err by reviewing the visa officer's interpretation of subsection 83(3) of the Regulations on the standard of correctness.

ii. Did the Judge err in setting aside the decision of the visa officer?

[29] The reasons of the visa officer are quoted above. The officer viewed subsection 83(3) of the Regulations to require study at a post-secondary Canadian institution in a single program of full-time study of at least two years' duration. The officer acknowledged the possibility of transfer from one institution to another in a similar program. He expressed concern, however, that Mr. Patel had completed a one-year program of study at one school and then completed one semester at a different school. The officer expressed further concern that the programs Mr. Patel enrolled in were two disparate, distinct programs.

[30] When applying the standard of correctness, a reviewing court shows no deference to the decision-maker's reasoning process. In the context of a decision of a visa officer, after undertaking its own analysis of the question the Court will either agree or disagree with the conclusion of the visa officer. Where it disagrees, the Court will substitute its own view and provide the correct answer (*Dunsmuir* at paragraph 50).

[31] Here, the Court must ascertain the meaning and effect of the phrase "completed a program of full-time study of at least two years' duration at a post-secondary institution in Canada" or "a complété avec succès un programme […] qui a nécessité au moins deux ans d'études à temps plein dans un établissement d'enseignement postsecondaire au Canada" found in subsection 83(3) of the Regulations.

[32] It is well-established that statutory interpretation requires consideration of the ordinary meaning of the words used as well as the statutory context and purpose. This was explained by the Supreme Court in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paragraph 10 and reiterated in *Celgene*, as cited above, at paragraph 21. In that case the Supreme Court quoted from and commented on *Canada Trustco* as follows:

> 21. […]:
>
> > It has been long established as a matter of statutory interpretation that "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": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the

> Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole. [para. 10.]
>
> The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute. [emphasis added]

[33] Interpreting subsection 83(3) of the Regulations to require study at a post-secondary Canadian institution in one program for at least two years is consistent with the plain meaning of both the English and French versions of the text. Both versions speak of having "completed a program of full-time study of at least two years' duration" or "complété avec succès un programme […] qui a nécessité au moins deux ans d'études." [emphasis added] Moreover, the French version is express that the program must be successfully completed. In my view, this evidences the legislative intent that one program should be completed, as opposed to study in disparate programs for a total of two years.

[34] In my view, such an interpretation is also consistent with the statutory context and the purpose of the legislation. Subsection 83(3) is part of a legislative regime designed to determine whether a skilled worker will be able to become economically established in Canada. Disparate programs, that is fundamentally different or distinct programs, are less likely to teach skills that will lead to economic establishment when compared with completion of one two-year program. I therefore disagree with the Judge's statement that there is no policy rationale that supports the visa officer's interpretation of subsection 83(3) of the Regulations.

[35] Based upon the text of subsection 83(3) and its statutory context and purpose, I respectfully conclude that the Judge erred in law when he found the visa officer incorrectly interpreted subsection 83(3) of the Regulations.

[36] Having found that the visa officer correctly interpreted subsection 83(3) of the Regulations, it remains to consider whether the officer's application of the provision to the facts before him was reasonable.

[37] Review on the reasonableness standard requires an inquiry into the existence of justification, transparency and intelligibility within the decision-making process. A reviewing court must also inquire whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir* at paragraph 47).

[38] While the reasons of the visa officer were brief, they provided a transparent and intelligible justification for the officer's decision. Further, no reviewable error has been shown in the visa officer's appreciation of the evidence before him. Mr. Patel had not completed a single program of full-time study of at least two years' duration.

[39] Based upon his correct interpretation of the Regulations and his application of subsection 83(3) to the facts before him, the visa officer's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

7. Conclusion

[40] For these reasons, I would allow the appeal, set aside the judgment of the Federal Court and dismiss Mr. Patel's application for judicial review.

[41] I would answer the certified question as follows:

> Q. In assessing adaptability under s. 83 of the *Immigration and Refugee Protection Regulations*, should a visa officer aggregate programs of study that do not each constitute two years of full-time study of at least two years' duration at a post-secondary institution in Canada and award points if the total period of study amounts to or exceeds two years of full-time study at one or more post-secondary institutions?
>
> A. In assessing adaptability under section 83 of the *Immigration and Refugee Protection Regulations*, a visa officer should not aggregate disparate programs of study and award points if the total period of study amounts to or exceeds two years of full-time study at one or more post-secondary institutions.

"Eleanor R. Dawson"
J.A.

"I agree.
J. Edgar Sexton J.A."

"I agree.
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Asha Gafar Alex Kam	FOR THE APPELLANT
Cathryn D. Sawicki	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada	FOR THE APPELLANT
Green and Spiegel LLP	FOR THE RESPONDENT