

BETWEEN:

PATRICK KINGSLEY FERNANDO

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

DAWSON J.

[1] Patrick Kingsley Fernando, the applicant, applied for permanent residence in Canada. Mr. Fernando brings this application for judicial review of the decision of S. Hanwella ("visa officer") of the Canadian High Commission in Colombo, Sri Lanka ("Commission") made on November 1, 1999, refusing his application.

FACTS

[2] Mr. Fernando's application for permanent residence in Canada stated that he applied under the assisted relative category, and that his intended occupation in Canada was "CATERER: Self-Employed". Mr. Fernando's application included his wife and child. The correspondence from his solicitors which forwarded his application stated that the application was submitted "for consideration according to the selection criteria of the Independent Immigrant category".

[3] Mr. Fernando was interviewed on November 1, 1999 at the Commission. The Commission had an unwritten policy in effect for an uncertain period of time concerning Sri Lankan education. The policy was finally reduced to writing some time between June of 1999 and December of 1999. Once reduced to writing the written policy was called the "Educational, Professional and Vocational qualifications available to the Sri Lankan student" ("Policy"). The Policy was based on a Sri Lankan regulation entitled "Admission of Students into General Certificate of Education (Advanced Level) (grade 12) Program" ("Sri Lankan Regulation").

[4] The Policy explained the Sri Lankan education system, stating that there was primary education, secondary education, and tertiary education. Tertiary education equates to a university course of study; secondary education requires a student to write two public examinations, the General Certificate of Education (Ordinary Level) and the General Certificate of Education (Advanced Level).

[5] The Ordinary Level ("O Level") examination tests a number of different subject areas. No certificate is obtained upon the successful completion of O Level examinations. However, in order for a student to proceed to the Advanced Level ("A Level") program, a student must obtain six ordinary passes (where marks between 35 and 50% are achieved) including three credits (where marks between 50 and 75% are achieved) in not more than two sittings. At the same time, a student must obtain at least ordinary passes in the first language and mathematics.

[6] In Sri Lanka, a student cannot go to university without completing A Level studies. If a student does not proceed to A Level studies, a student may proceed to a technical institute. In every case it is left up to the technical institute to determine the minimum number of O Level passes and/or credits required to enter the institute. Because the Sri Lankan

government did not set standards for what is considered a successful completion of the O Level examinations, the Commission adopted the entry requirements for the A Level as the mark for successful completion of O Level studies.

[7] Mr. Fernando did not meet the A Level entry requirements. Mr. Fernando says that he passed five subjects in one sitting in 1971, including a pass in the Sinhala language and a credit in mathematics. He also says that he passed a sixth subject in 1974 and received another credit. The visa officer says that Mr. Fernando passed four subjects in 1971 with one credit, passed another four subjects in 1972, and received a single credit in 1974. On either basis Mr. Fernando received only two of the required three credits. There does not appear to be any dispute that Mr. Fernando went on to complete a three-month hotel management course, and a two-month external catering course.

[8] The visa officer awarded no points to Mr. Fernando under the "Education Factor" of Schedule I of the *Immigration Regulations, 1978, SOR/78-172* ("Regulations"). Mr. Fernando was not provided with a copy of the Policy; however, it is unclear whether the Policy was written at the time of the interview. Mr. Fernando was assessed only under the occupation "Caterer" and not assessed as a "Self-Employed" person. As a result of the assessment Mr. Fernando was awarded a total of 68 units (63 + 5 bonus units as an assisted relative) under Schedule I of the Regulations, 2 units short of the number required in order to obtain an immigrant visa.

ISSUES

[9] Mr. Fernando asserts that in assessing his application for permanent residence the visa officer erred in that she:

- i) failed to assess him under the alternate occupation of "self-employed" person;
- ii) erred in law in assessing his educational qualifications; and
- iii) breached the duty of fairness in the manner in which she assessed his educational qualifications.

ANALYSIS

(i) Did the visa officer err in failing to assess Mr. Fernando as a "Self-Employed" person?

[10] A visa officer is obliged to assess an applicant in the occupation or alternate occupations which the applicant states he or she intends to pursue in Canada (see, for example, *Issaeva v. Canada (Minister of Citizenship and Immigration)* (1996), 37 Imm. L.R. (2d) 91 (F.C.T.D.)).

[11] Mr. Fernando points to his application where he stated that he intended to pursue the occupation of both caterer and self-employed, and to the covering letter provided by his counsel. The visa officer's refusal letter failed to indicate an assessment in the occupation or category of self-employed and there is nothing in the tribunal record to indicate that such assessment was made. Mr. Fernando says, in consequence, that the visa officer failed in her duty and therefore committed a reviewable error.

[12] In response, the Minister says that an application for permanent residence is not a duly completed application until the necessary fees are paid, and that Mr. Fernando failed to pay the appropriate fees in order to be assessed in the self-employed category. Because, it is submitted, his application was incomplete, the visa officer had no duty to assess Mr. Fernando on this "incomplete portion of his application".

[13] Mr. Fernando replies that there is no evidence that he failed to pay the proper fees and that in any event there was a duty to advise him of any deficiency in the fees paid. He was not notified of any deficiency. Mr. Fernando relied upon *Choi v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 763 (F.C.A.) to the effect that immigration authorities must provide the "full picture" to an applicant.

[14] What does the evidentiary record disclose with respect to the payment of fees? Contained in the tribunal record is a copy of the receipt issued showing payment of fees in the total amount of \$1,100. The receipt details "Perm. Res. App \$500.00", "Perm. Res. 19 + \$500.00" and "Perm. Res. 19 - \$100.00" to total \$1,100. The application was received on October 24, 1995 which is the "lock-in date" for the application.

[15] The *Immigration Act Fees Regulations*, SOR/86-64 ("Fees Regulations") in force at that time required in respect of applications for landing, payment of a fee of \$500.00 at the time an application was made. Additional fees were required in the amount of \$500.00 for a spouse, and \$100.00 for a dependent (not a spouse) under 19 years of age. However, an application for landing "by an entrepreneur, an investor, or a self-employed person" required a fee of \$825.00. Additional fees for spouses and minor dependents were the same as in other applications.

[16] On this basis I conclude from the tribunal record that Mr. Fernando did not pay the fees required in order for his application to be processed in the self-employed category.

[17] As to the consequence of that failure, in *Maharaj v. Canada (Minister of Citizenship and Immigration)* (1995), 103 F.T.R. 205 (T.D.) Teitelbaum J. considered what makes up an application for permanent residence. He concluded, in view of the requirement of the Fees Regulations that fees be paid at the time an application for landing is made, that an application cannot be processed until it is perfected. Perfection requires that the necessary fees be paid. I, respectfully, agree. There was, therefore, no duty at law to assess Mr. Fernando as a self-employed person absent the payment of the requisite fees at the time the application for landing was made.

[18] As to any breach of fairness arising from the failure to inform Mr. Fernando of the deficiency, any obligation so to advise Mr. Fernando could only arise if there was, or should have been, recognition of any expectation that Mr. Fernando would be assessed as a self-employed person.

[19] Mr. Fernando's application was submitted by experienced counsel under cover of correspondence which referenced consideration according to the selection criteria of the "Independent Immigrant" category. While that term is not defined in the Act or the Regulations, the Overseas Processing Manual then in effect drew a distinction between processing "Independent Immigrants" and processing "Entrepreneurs and Self-employed Immigrants" devoting separate chapters to each. Thus I find that counsel's reference to the "Independent Immigrant" category would not alert the Commission to any expectation that Mr. Fernando was applying as a self-employed person. I am satisfied that I may have regard to that manual as evidence of the way that the Act and Regulations are applied. See, *Nguyen v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 232 (F.C.A.), at page 245.

[20] Further, an applicant in the self-employed category is subject to the definition of self-employed persons found in subsection 2(1) of the Regulations. This requires an applicant to establish that he or she intends, and has the ability, to establish or purchase a business in Canada that will create an employment opportunity for the immigrant and will make a significant contribution to the economy or the cultural or artistic life of Canada.

[21] In the case before me, there was nothing in counsel's submissions, or the material provided, to indicate how it was that Mr. Fernando would qualify as a self-employed person as defined in the Regulations.

[22] In all of these circumstances, I cannot find that there should have been a recognition by the visa officer of an intent to apply as a self-employed person. It follows that I find no breach of any duty of fairness which may have been owed, and no reviewable error in failing to have assessed Mr. Fernando in the self-employed category.

(ii) Did the visa officer err in assessing Mr. Fernando's educational qualifications?

[23] Subsection 1 of the educational factor set out in Schedule I of the Regulations is, in material part, as follows:

- (1) Subject to subsections (2) to (4), units of assessment shall be awarded as follows:
- (1) Sous réserve des paragraphes (2) à (4), des points d'appréciation sont attribués selon le barème suivant :
- (a) where a diploma from a secondary school has not been completed, zero units;
- a) lorsqu'un diplôme d'études secondaires n'a pas été obtenu, aucun point;
- (b) where a diploma from a secondary school has been completed, the greater number of the following applicable units:
- b) lorsqu'un diplôme d'études secondaires a été obtenu, le plus élevé des nombres de points applicables suivants :
- (i) in the case of a diploma that does not lead to entrance to university in the country of study and does not include trade or occupational certification in the country of study, five units,
- (i) si le diplôme ne rend pas le titulaire admissible à des études universitaires et ne lui confère pas de qualification de membre d'un corps de métier ou d'un groupe professionnel dans le pays où il a été obtenu, 5 points,
- (ii) in the case of a diploma that may lead to entrance to university in the country of study, ten units, and
- (ii) si le diplôme rend le titulaire admissible à des études universitaires dans le pays où il a été obtenu, 10 points,
- (iii) in the case of a diploma that includes trade or occupational certification in the country of study, ten units;
- (iii) si le diplôme confère une qualification de membre d'un corps de métier ou d'un groupe professionnel dans le pays où il a été obtenu, 10 points;
- (c) where a diploma or apprenticeship certificate that requires at least one year of full-time classroom study has been completed at a college, trade school or other post-secondary institution, the greater number of the following applicable units:
- c) lorsqu'un diplôme ou un certificat d'apprentissage d'un collège, d'une école de métiers ou de tout autre établissement postsecondaire, qui comporte au moins un an d'études à temps plein en salle de cours, a été obtenu, le plus élevé des nombres de points applicables suivants :
- (i) in the case of a diploma or apprenticeship certificate program that requires completion of a secondary school diploma referred to in subparagraph (b)(i) or (iii) as a condition of admission, ten units; and
- (i) si le programme d'études menant à un tel diplôme ou certificat exige un diplôme d'études secondaires visé aux sous-alinéas b)(i) ou (iii), 10 points,
- (ii) in the case of a diploma or apprenticeship certificate program that requires completion of a secondary school diploma referred to in subparagraph (b)(ii) as a condition of admission, thirteen units;
- (ii) si le programme d'études menant à un tel diplôme ou certificat exige un diplôme d'études secondaires visé au sous-alinéa b)(ii), 13 points;
- (d) where a first-level university degree that requires at least three years of full-time study has been completed, fifteen units; and
- (e) where a second- or third-level university degree has been completed, sixteen units.
- d) lorsqu'un diplôme universitaire de premier cycle, comportant au moins trois

ans d'études à temps plein, a été obtenu, 15 points;

e) lorsqu'un diplôme universitaire de second ou de troisième cycle a été obtenu, 16

points.

[24] None of subsections 2 to 4 are relevant to the matters at issue.

[25] Mr. Fernando asserts that it is a misinterpretation of subsection 1(b)(i) of the educational factor of the Regulations to find that his O Level education is not "a diploma that does not lead to entrance to university in the country of study and does not include trade or occupational certification in the country of study". Mr. Fernando argues that the visa officer's interpretation of the subsection is too restrictive because she reads in a requirement that a student must be eligible for admission to the A Level program in order to be considered to have successfully finished secondary school. Mr. Fernando submits that because there is no definition of a "secondary school" in the Regulations, Parliament intended to allow for a broad and unrestricted definition. Since generally in Sri Lanka six passes at the G.C.E. O Level are sufficient to allow entry to technical colleges, it is submitted that it is possible that the O Level examinations constitute completion of secondary school.

[26] The Commission's Policy considers a student to have successfully completed a secondary school education if the student meets the A Level entry requirements. This Policy is based upon the standards set by the Sri Lankan government. The education factor states that zero units are awarded where no diploma from a secondary school was concluded. I am therefore unable to find that requiring an applicant to obtain results which would allow the applicant to obtain admission to A Level studies is sufficiently unreasonable as to warrant judicial interference.

[27] There remains to consider if the visa officer properly applied the Policy.

[28] In the CAIPS notes the visa officer recorded that:

PI HAS NEVER COMPLETED O LEVEL SUCCESSFULLY IE OBTAINED SIX PASSES WITH FOUR CREDITS INCLUDING FIRST LANGUAGE AND MATH AT THE SAME SITTING. ... EARNS NO POINTS FOR EDUCATION.

[29] The CAIPS notes conclude as follows:

DOES NOT EARN SUFFICIENT POINTS. EXPLAINED DECISION TO PI. NO FURTHER COMMENTS.

[30] I accept on the record before me that the visa officer was confused as to the criteria for entrance into the G.C.E. (A Level) program. The CAIPS notes reflect her understanding that the requirement to successfully complete the O Level is "six passes with four credits including first language and math at the same sitting". In her affidavit the visa officer stated that the admission requirements were a "minimum of six passes including three credits, with at least ordinary passes in the first language and mathematics in one and the same sitting".

[31] On cross-examination the visa officer admitted that both the CAIPS notes and her affidavit were wrong in that a student need only obtain six ordinary passes including three credits in not more than two sittings. The Policy was also wrong in one respect in that it should have indicated that a student is entitled to obtain the requisite results in not more than two sittings, as opposed to not less than two sittings.

[32] While on her cross-examination the visa officer attempted to explain these discrepancies, they are a matter of concern. Also of concern is the discrepancy between the visa officer and Mr. Fernando as to which examinations he took and passed.

[33] As to the evidence of what transpired at the interview, Mr. Fernando swore that:

11. At the interview, the officer addressed my education for the first time, by telling me that I would not be given any points for education because I had failed the G.C.E. (O/L) examination at the first sitting. The officer stated to me that according to a new circular from the Sri Lankan Department of Education, in order to successfully complete the G.C.E. (O/L) examination I had to have obtained six passes with four credits at one sitting. I was completely surprised by what the officer stated about my education. I immediately told the officer that I had passed five subjects at one sitting in 1971 receiving one credit and that I passed the sixth subject in English language at the next sitting in 1974, receiving a second credit. I told the officer that at the time I completed my examinations I was eligible to attend post-secondary education with the results I had received. I asked the officer if she would show me the circular that she was referring to but she refused to do so. I told the officer that her statement that I had not successfully passed my G.C.E. (O/L) examination was wrong and certainly did not apply in 1974, at the time I completed my examinations. I specifically asked the officer to allow me an opportunity to provide her with additional documentation from the Department of Education to satisfy her that I had successfully completed my G.C.E. (O/L) examinations and that I was eligible to attend post-secondary education based on the results I had received notwithstanding my two sittings. The officer refused to allow me an opportunity to provide her with any further material and stated to me categorically that she would not give me any points for education.

[34] The visa officer swore that:

15. At paragraph 11 of the Applicant's affidavit, the Applicant alleges that I mentioned a "new circular" from the Sri Lankan Department of Education during the interview, and that he had asked to see it. This assertion is incorrect as I did not mention any such circular to the Applicant and as a result, he could not have asked to see it. I explained to the Applicant that according to the regulations of the Department of Education, he failed to earn the minimum results in any of the three attempts he had made at the GCE (Ordinary Level) exam that would allow him to proceed to the next phase of education, i.e. - Advanced Level (post secondary level).

16. Also at paragraph 11 of the Applicant's affidavit, the Applicant alleges that he told me that my assessment of his exam results as being insufficient to allow him to pursue his "A" levels was wrong. He further alleges that he told me at the time he completed his exam in 1974, that his results were sufficient to allow him to pursue his "A" levels. These assertions are incorrect. Firstly, he did not tell me that he thought my assessment of his exam results was wrong, and this is reflected in CAIPS notes at page 3 of the tribunal record where I wrote: "Explained decision to PI. No further comments."

[...]

17. The final assertion that the Applicant makes in paragraph 11 of his affidavit is that I allegedly refused him an opportunity to provide any further material. This is not true. Had the Applicant made such a request, I would have asked him to specify what documents he wished to produce. He made no such request.

[35] The visa officer was cross-examined on her affidavit, Mr. Fernando was not.

[36] Both Mr. Fernando and the visa officer appear to agree on one thing: the visa officer was proceeding on the basis that the minimum results had to be obtained in a single sitting.

[37] While I have concluded that the Commission's Policy was not so unreasonable as to warrant interference, I have been persuaded that because the visa officer was operating under an erroneous belief at the time of the interview that a student was required to obtain six passes with four credits at one sitting (as opposed to six passes with three credits at up to two sittings) the assessment was sufficiently flawed that the decision of the visa officer should be set aside. Had the visa officer not apparently dismissed Mr. Fernando's results out of hand because sufficient credits were not obtained in one sitting she may have determined that Mr. Fernando was entitled to at least 5 units under the educational factor (if satisfied that successful completion of the O Level fell within paragraph 1(b)(i) of the educational factor) or viewed his personal suitability in a different light as Mr. Fernando was only 2 units short of the number required for obtaining a visa. I am not prepared to speculate upon the effect of the visa officer's mistaken belief.

[38] In view of this conclusion it is not necessary to consider the final argument advanced on Mr. Fernando's behalf.

[39] Mr. Fernando seeks costs. I find that no special reasons exist that would warrant an award of costs.

[40] Having read the submissions of counsel with respect to certification of a question, no question is certified as I am not satisfied that a question of general importance is raised.

[41] In the result, for the reasons set out above, the application for judicial review is allowed and the decision of the visa officer made on November 1, 1999 is set aside so that the matter is to be remitted for redetermination before a different visa officer.

"Eleanor R. Dawson"

J.F.C.C.

Toronto, Ontario

March 20, 2001

FEDERAL COURT OF CANADA

Names of Counsel and Solicitors of Record

COURT NO: IMM-5899-99

STYLE OF CAUSE: PATRICK KINGSLEY FERNANDO

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND

IMMIGRATION

Respondent

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REASONS FOR JUDGMENT BY: DAWSON J.

DATED: TUESDAY, MARCH 20, 2001

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FEDERAL COURT OF CANADA

Date: 20010320

Docket: IMM-5899-99

Between:

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