Federal Court  Cour fédérale

Date: 20110407

Docket: IMM-3380-10

Citation: 2011 FC 430

Ottawa, Ontario, April 7, 2011

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

NAJI ARAMOUNI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application, pursuant to section 72 of the *Immigration and Refugee Protection Act* (*IRPA*), for judicial review of a March 19, 2010 decision of a visa officer at the Canadian Embassy in Warsaw, Poland denying the application for permanent residence in Canada as a member of the federal skilled worker class.

[2] For the reasons that follow, I have come to the conclusion that the decision of the immigration officer, and in particular the award of points to the Applicant equivalent to an

intermediate level for his English proficiency, was unreasonable given the documents submitted. However, I have found that the officer committed no breach of natural justice or procedural fairness in coming to that decision.

1. Facts

[3] The Applicant, Mr. Aramouni, is a Lebanese citizen. He submitted an application for permanent residence in the skilled worker category on March 24, 2004 to the Embassy of Canada in Damascus. His file was later transferred for processing to the Embassy in Warsaw, Poland.

[4] Mr. Aramouni states that he has a high level of English language proficiency because he studied at the elementary, secondary, and university level in English. In addition, he states that some of the training he completed in the Lebanese army allowed him to perfect his level of English.

[5] In his application for permanent residency, however, he did not submit the results of a linguistic competency test from an organization designated by Citizenship and Immigration Canada. Instead, he provided various documents supporting his claims of proficiency, including English language tests he had written in Lebanon.

[6] In July 2009, his application was rejected because he did not obtain the required number of points to immigrate to Canada; the agent assigned him very few points for his competency in English. This was fewer points for the category of language proficiency than the Applicant believed he deserved.

[7] In November 2009, the decision rejecting his application was returned to a new agent for re-determination, despite the fact that his application for leave and judicial review of the July 2009 decision was rejected. Around January 13, 2010, the immigration officer sent a letter to the Applicant explaining that the information he had submitted was insufficient to determine that his proficiency in English was as high as he claimed. The agent suggested that the Applicant provide the results of a linguistic test or additional documents that would demonstrate that he met the linguistic requirements to immigrate to Canada in the skilled worker class.

[8] On February 22, 2010, the embassy received additional documents relating to his ability in English (rather than the results of an approved linguistic test). On the basis of the documents submitted, the agent awarded him eight points for his English proficiency, bringing him to a total of 63 points out of the required 67. The score of eight corresponds to a medium rather than to a high level of competency.

[9] On March 19, 2010, the embassy informed the Applicant by letter that he had not earned a sufficient number of points to immigrate to Canada.

2. <u>The impugned decision</u>

[10] The decision takes the form of a letter which explains to the Applicant that his application is refused because he does not meet the requirements of the Act and regulations. Most of the letter is a form letter explaining the relevant legislation, the selection process and the point system.

[11] The information that is personalized to the Applicant includes a table showing the number of points obtained by the Applicant in comparison to the maximum number of points available for each category.

	Points assessed	Maximum
Age	10	10
Education	20	25
Arranged employment	0	10
Official language proficiency	8	24
Adaptability	4	10

[12] Evidently, the Applicant's lack of points in the categories of arranged employment, official language proficiency, and adaptability all contributed to his failure to gain the required number of points.

[13] The letter also stated the following: "Although you stated in your application that you had high proficiency in English I was able to award you 8 points only based on the information available on file".

3. Issues

[14] The Applicant contends that the decision is flawed essentially for two reasons. On the merits, he submits that the officer was unreasonable in awarding only eight points for his English proficiency. He also argues that the decision is procedurally deficient, in that the officer failed to consider relevant evidence when making his decision and did not provide adequate reasons.

4. Analysis

[15] It is clear that the assessment of an application for permanent residence under the federal skilled worker class is an exercise of a visa officer's discretion, and as such it attracts a standard of reasonableness: *Roberts v Canada (Minister of Citizenship and Immigration)*, 2009 FC 518, at para 15; *Persaud v Canada (Minister of Citizenship and Immigration)*, 2009 FC 206, at para. 22. On the other hand, the duty to give reasons raises an issue of procedural fairness, and this aspect of the decision must accordingly be reviewed on the correctness standard like every other aspects of procedural fairness: *Al-Kassous v Canada (Minister of Citizenship and Immigration)*, 2007 FC 541, at para 11; *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at para 100.

[16] Up until June 26, 2010, an applicant could establish his language proficiency either by submitting tests results from a language testing agency designated by the Respondent, or by providing other evidence in writing of his proficiency in the English or French language. Section 79 of the *Immigration and Refugee Protection Regulations* (*IRPR*) stated the following:

Immigration and Refugee Protection Regulations, SOR/2002-227	*Règlement sur l'immigration et la protection des réfugiés*, DORS/2002-227
Official languages	Langues officielles
79. (1) A skilled worker must specify in their application for a permanent resident visa which language — English or French — is to be considered their first official language in Canada and which is to be considered their second official language in Canada and must have their proficiency in those languages assessed by an organization or institution designated under subsection (3).	**79.** (1) Le travailleur qualifié indique dans sa demande de visa de résident permanent la langue — français ou anglais — qui doit être considérée comme sa première langue officielle au Canada et celle qui doit être considérée comme sa deuxième langue officielle au Canada et fait évaluer ses compétences dans ces langues par une institution ou organisation désignée aux termes du paragraphe (3).

Proficiency in English and French (24 points)

(2) Assessment points for proficiency in the official languages of Canada shall be awarded up to a maximum of 24 points based on the benchmarks referred to in Canadian Language Benchmarks 2000 for the English language and Niveaux de compétence linguistique canadiens 2006 for the French language, as follows:

(a) for the ability to speak, listen, read or write with high proficiency

(i) in the first official language, 4 points for each of those abilities if the skilled worker's proficiency corresponds to a benchmark of 8 or higher, and

(ii) in the second official language, 2 points for each of those abilities if the skilled worker's proficiency corresponds to a benchmark of 8 or higher;

(b) for the ability to speak, listen, read or write with moderate proficiency

(i) in the first official language, 2 points for each of those abilities if the skilled worker's proficiency corresponds to a benchmark of 6 or 7, and

(ii) in the second official language, 2 points for each of those abilities if the skilled worker's proficiency corresponds to a benchmark of 6 or 7; and

(c) for the ability to speak, listen, read or write

(i) with basic proficiency in either official language, 1 point for each of those

Compétence en français et en anglais (24 points)

(2) Le maximum de points d’appréciation attribués pour la compétence du travailleur qualifié dans les langues officielles du Canada est de 24, calculés d’après les standards prévus dans les Niveaux de compétence linguistique canadiens 2006, pour le français, et dans le Canadian Language Benchmarks 2000, pour l’anglais, et selon la grille suivante :

a) pour l’aptitude à parler, à écouter, à lire ou à écrire à un niveau de compétence élevé :

(i) dans la première langue officielle, 4 points pour chaque aptitude si les compétences du travailleur qualifié correspondent au moins à un niveau 8,

(ii) dans la seconde langue officielle, 2 points pour chaque aptitude si les compétences du travailleur qualifié correspondent au moins à un niveau 8;

b) pour l’aptitude à parler, à écouter, à lire ou à écrire à un niveau de compétence moyen :

(i) dans la première langue officielle, 2 points pour chaque aptitude si les compétences du travailleur qualifié correspondent aux niveaux 6 ou 7,

(ii) dans la seconde langue officielle, 2 points si les compétences du travailleur qualifié correspondent aux niveaux 6 ou 7;

c) pour l’aptitude à parler, à écouter, à lire ou à écrire chacune des langues officielles :

(i) à un niveau de compétence de base faible, 1 point par aptitude, à concurrence

abilities, up to a maximum of 2 points, if the skilled worker's proficiency corresponds to a benchmark of 4 or 5, and

(ii) with no proficiency in either official language, 0 points if the skilled worker's proficiency corresponds to a benchmark of 3 or lower.

Designated organization

(3) The Minister may designate organizations or institutions to assess language proficiency for the purposes of this section and shall, for the purpose of correlating the results of such an assessment by a particular designated organization or institution with the benchmarks referred to in subsection (2), establish the minimum test result required to be awarded for each ability and each level of proficiency in the course of an assessment of language proficiency by that organization or institution in order to meet those benchmarks.

Conclusive evidence

(4) The results of an assessment of the language proficiency of a skilled worker by a designated organization or institution and the correlation of those results with the benchmarks in accordance with subsection (3) are conclusive evidence of the skilled worker's proficiency in the official languages of Canada for the purposes of subsections (1) and 76(1).

de 2 points, si les compétences du travailleur qualifié correspondent aux niveaux 4 ou 5,

(ii) à un niveau de compétence de base nul, 0 point si les compétences du travailleur qualifié correspondent à un niveau 3 ou à un niveau inférieur.

Organisme désigné

(3) Le ministre peut désigner les institutions ou organisations chargées d'évaluer la compétence linguistique pour l'application du présent article et, en vue d'établir des équivalences entre les résultats de l'évaluation fournis par une institution ou organisation désignée et les standards mentionnés au paragraphe (2), il fixe le résultat de test minimal qui doit être attribué pour chaque aptitude et chaque niveau de compétence lors de l'évaluation de la compétence linguistique par cette institution ou organisation pour satisfaire à ces standards.

Preuve concluante

(4) Les résultats de l'examen de langue administré par une institution ou organisation désignée et les équivalences établies en vertu du paragraphe (3) constituent une preuve concluante de la compétence du travailleur qualifié dans les langues officielles du Canada pour l'application des paragraphes (1) et 76(1).

[17] The written documentation submitted by the Applicant included:

- An affidavit detailing the Applicant's knowledge and experience in the English language thereby exhibiting his fluency;

- A letter from the Director of the Lebanese University attesting that the Faculty of Economics and Business Administration adopts English as the official teaching language and all the courses attended by the Applicant were lectured in English;

- An attestation from the Dean of the Faculty of Business Administration at the Lebanese University certifying that the Applicant successfully completed the four year Business Administration program;

- A letter written by the Applicant to the Surgeon General Lieutenant General James B. Peake M.B. located in the USA in 2002 further to his employment travel to the USA;

- Two English Comprehension Level (ECL) tests during employment in the Lebanese Armed Forces administered by the Embassy of the USA where the Applicant obtained a score of 87% and 88% respectively;

- The result of English language exam test administered by the Ministry of Defence, where the Applicant obtained a score of 92%;

- A certification from the Ministry of National Defence detailing courses taken by the Applicant inside and outside of Lebanon. Courses outside of Lebanon include a 6 months Quartermaster Officer Basic Course (QMOBC) in the Ft. Lee, Virginia, USA;

- A U.S. Army Diploma stating that the Applicant successfully completed the *Medical Strategic Leadership Program Course* in Fort Sam, Houston, Texas, USA;

- A certificate from the Surgeon General, United States, recognizing the honorary affiliation of the Applicant with the U.S. Army Medical Department Regiment.

[18] In light of all these documents, it is difficult to understand how the Officer could come to the conclusion that the Applicant does not possess more than an intermediate proficiency in the English language, especially with respect to reading and listening. If the Applicant has been able to complete successfully a university degree as well as some training with the U.S. Army, surely he must have a pretty good command of the English language, at least in its passive dimension (reading and listening).

[19] The CAIPS notes submitted by the Officer as an exhibit to his affidavit in this Court do not really explain why he came to the conclusion that the documents filed by the Applicant are insufficient to demonstrate a high degree of proficiency in English. After reviewing the documents submitted, he stated the following:

> …transcript from Lebanese University and high school do not provide any details of his achievements in English, no documents for elementary/intermediate education on file, English language test certificates provide only a numerical result of abilities but no indication of the scale or level of proficiency, certificates from course in U.S. and ones given by U.S. organizations do not provided [sic] any information regarding subject s [sic] abilities in English. Evidence does not support claimed abilities.

[20] In the absence of a strict requirement that language proficiency be established exclusively on the basis of a pre-approved test, (and there was no such requirement at the time Mr. Aramouni filed his application), one fails to see what better proof of his high proficiency in reading and listening English he could have submitted. Of course, university transcripts and certificates for professional courses would not provide information as to the language skills of a student; nevertheless, it is a safe assumption that successful completion of a university degree and of a training program in a foreign country cannot be but clear and convincing evidence of one's extensive grasp of the language into which the courses and instructions were given.

[21] A quick perusal of the reading and listening benchmarks found in the *Canadian Language Benchmarks 2000*, against which officers are to assess the proficiency levels of applicants pursuant to the Operational Manual *OP6 - Federal Skilled Workers*, convinces me that a university graduate who has followed all his courses in English must be understood to have a pretty good grasp of that language and to meet Benchmark 8, described as "fluent intermediate proficiency", at least with

respect to reading and listening. Despite the deference that this Court must show in these matters to the officers on the ground, I am of the view that the decision is not one that falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47.

[22] Having concluded that the decision is unreasonable, there is no need to determine whether it is also flawed for reasons of procedural fairness. I will, nevertheless, venture the following remarks. First, I do not think it can be said that the immigration officer did not consider all the evidence that was submitted. The CAIPS notes, which form part of the reasons for the decision – see *Ogunfowora v Canada (Minister of Citizenship and Immigration)*, 2007 FC 471, at para 60; *Kalra v Canada (Minister of Citizenship and Immigration)*, 2003 FC 941, at para 15 – clearly indicate that all the evidence submitted was indeed considered. The Officer may not have drawn a reasonable decision from that evidence, but his decision cannot be impeached on the basis that he disregarded relevant portions of the documentation that was filed by the Applicant.

[23] As for the argument that the Officer failed to give adequate reasons for his decision, it is without merit. First of all, I agree with the Respondent that a judicial review applicant cannot contest the sufficiency of reasons offered by a decision-maker without first having requested additional reasons from that officer or tribunal. This rule, which appears to originate from *Marine Atlantic Inc. v Canadian Merchant Service Guild*, [2000] FCJ No 1217, has been cited with approval in many subsequent cases, including *Tran v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 1078, at para 23 and *Hayama v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1305, at paras 14-15. Under this rule, an applicant cannot

contest the sufficiency of the reasons without having first requested additional reasons from the officer.

[24] Moreover, this is not a case where the reasons are insufficient to allow the Applicant to know why his claim was rejected. Contrary to other cases where the decision has been found lacking because the decision-maker merely stated a conclusion without providing any discussion of the arguments put forward by the Applicant, the CAIPS notes in the case at bar do provide a semblance of reasoning. The real problem is not so much that the reasons are inadequate in the sense of being too cryptic, but that they fail to provide a convincing explanation as to why the documents submitted by the Applicant do not demonstrate a high degree of proficiency in the English language. This goes to the merit of the decision, as opposed to a deficiency of a procedural nature.

[25] For all the foregoing reasons, I find that this application for judicial review ought to be granted. No question of general importance has been raised by counsel, and none will be certified.

ORDER

THIS COURT ORDERS THAT this application for judicial review is granted.

"Yves de Montigny"

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Judge

FEDERAL COURT

SOLICITORS OF RECORD

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