Federal Court  Cour fédérale

Date: 20130527

Docket: IMM-12568-12

Citation: 2013 FC 554

Ottawa, Ontario, May 27, 2013

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

DMITRI ALEXANDROVICH SMIRNOV

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) of a decision of a Citizenship and Immigration Canada case officer (the officer), dated November 29, 2012, wherein the applicant's application for a permanent resident visa as a member of the Canadian experience class was refused. The officer was not satisfied that the applicant met the official language proficiency requirements prescribed in the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). For the following reasons, the application for judicial review will be dismissed.

Facts

[2] Mr. Dmitri Smirnov (the applicant) is a citizen of Russia and is deaf since birth. He primarily uses sign language to communicate (Application Record, Affidavit of the Applicant, p 8). According to the applicant, primary and secondary education for the deaf in Russia was not adequately adapted to deaf students' needs, and the applicant left high school at what he deems to be the equivalent of grade ten (10) in Canada, but perceives that the materials learned are equivalent to that of grade eight (8) in Canada (Application Record, Affidavit of the Applicant, pp 9-10). The applicant is now fluent in American Sign Language (ASL), which he learned upon his arrival in the United States (Application Record, Affidavit of the Applicant, p 10). The applicant lived in the United States as a permanent resident prior to moving to Canada in February 2006 (Respondent's Record, Affidavit of Jennifer Carlile, Tab 2, para 6; Tribunal Record, p 95). The applicant has worked in Canada as a painter since his arrival in 2006 (Tribunal Record, pp 81-83). His current work permit in Canada is valid until June 2014 (Respondent's Record, Affidavit of Jennifer Carlile, Tab 2, para 5).

[3] The applicant submitted a Generic Application Form (IMM 0008) for permanent residence on December 3, 2011 (Tribunal Record, pp 81-92). The applicant indicated he was applying as a "skilled worker" (Tribunal Record, p 81), a Division in the Regulations that encompasses both the federal skilled workers and Canadian experience classes, amongst others. The applicant submitted a Schedule 8 form for the Canadian experience class, where he indicated having more than two (2) years of experience working full-time in Canada under the National Occupational Classification (NOC) code 7294, "Painter", since February 2006 (Tribunal Record, pp 99-101). He did not submit

a Schedule 3 form for the federal skilled worker class. He was assessed under the Canadian experience class.

[4] Along with his application, the applicant submitted a report from the International English Language Testing System (IELTS), indicating test results of 3.5 on both reading and writing abilities (Tribunal Record, p 107). A test result of 3.5 in reading converts to a Canadian Language Benchmark (CLB) score of less than 4, while a test result of 3.5 in writing converts to a CLB score of 4 (Respondent's Book of Authorities, Tab 4, p 14, Operational Manual 25: Canadian Experience Class). The IELTS report included comments to the effect that due to the applicant's extreme speaking and hearing difficulties, he was exempt from the speaking and listening tests. The applicant was nonetheless given scores of 3.5 on both speaking and listening abilities, scores which were "notionalized on the basis of the average of the other two bandscores" (Tribunal Record, p 107).

[5] The applicant also included test results from the Canadian Hearing Society for his abilities in American Sign Language (ASL), for which the applicant scored 9.2 out of 10 for Expressive skills (analogous to "speaking") and 9 out of 10 for Receptive skills (analogous to "listening") (Tribunal Record, pp 116-17). The applicant also submitted a letter from his representative explaining that he was deaf since birth and commenting on his ability to communicate in a very detailed manner using ASL (Tribunal Record, pp 109-10).

Impugned decision

[6] In a decision dated November 29, 2012, the officer refused the applicant's application for a permanent resident visa as a member of the Canadian experience class. The officer explained that applicants in the Canadian experience class are assessed on a pass/fail basis as set out in paragraph 87.1(2) of the Regulations. The officer assessed the applicant's application based on his work experience as a painter (NOC 7294).

[7] The officer's notes indicate that the supporting documents submitted by the applicant were sufficient to demonstrate his experience under his declared NOC 7294 Painter category. The notes also reveal that the officer was aware that the applicant is deaf, and obtained scores of 9.2 and 9.0 on ASL proficiency assessments for Expressive and Receptive tests, respectively (Tribunal Record, p 2).

[8] However, the officer was not satisfied that the applicant met the official language proficiency requirement, having received IELTS scores of 3.5 on both reading and writing, equivalent to Canadian Language Benchmarks (CLB) of 4 or less. The officer explained that, based on his occupation and his application in the Canadian experience class, the applicant was required to obtain either CLBs of 5 in each ability (reading, writing, speaking and listening), or the following combination: a CLB of 4 in one (1) ability, 5 or more in two (2) abilities, and 6 or more in the remaining ability. Since the applicant has two (2) CLBs of 4 or less, he did not meet the official language requirement and his application was refused.

Issues

[9] The Court is of the view that the issues raised in this application for judicial review are as follows :

a. Did the officer err by not taking into account the applicant's ASL scores?

b. Did the officer err by not assessing the applicant's application under the federal skilled workers class, but only under the Canadian experience class?

c. Did the officer's decision refusing the applicant's application for permanent residence and the Regulations violate the right to equality guaranteed by subsection 15(1) of the *Charter*?

Relevant legislation

[10] The relevant dispositions from the Act and its Regulations are set out in the Annex to this judgment. The Regulations have been modified since the officer's November 29, 2012 decision. The Regulations in force at the time specifically provided that a foreign national who acquired work experience in an occupation listed in Skill Level B of the National Occupational Classification matrix, as is the applicant's case, had to have their abilities to speak, listen, read and write assessed by a designated organization or institution and meet the following benchmarks: i) either a CLB score of 5 or higher on each of the four (4) abilities, or ii) a CLB score of 4 for any one (1) ability, a CLB score of 5 or higher for any other two (2) abilities, and a CLB score of 6 or higher for the remaining ability. These are the benchmarks the officer used to evaluate the applicant.

[11] The Regulations now provide, through section 74 which was not in force at the time the impugned decision was rendered, that the Minister shall fix, by class or by occupation, minimum language proficiency thresholds on the basis of the number of applications processed in all classes, the number of immigrants who are projected to become permanent residents, and the potential for

the establishment in Canada of applicants in the federal skilled worker class, the Canadian experience class, and the federal skilled trades class, taking into account their linguistic profiles, economic factors and other relevant factors.

Standard of review

[12] The applicant contends that the applicable standard of review in the present case is correctness. The respondent, on the other hand, submits that an officer's determination under the Canadian experience class involves findings of fact and law, and is therefore reviewable on a standard of reasonableness (*Anabtawi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 856 at para 28, 11 Imm LR (4th) 302; *Arachchige v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1068 at para 8, [2012] FCJ No 1150 (QL)).

[13] The Court agrees with the respondent that the issues pertaining to the officer's determination of the applicant's application for permanent residency are subject to the deferential standard of reasonableness. The Court should therefore not intervene unless the officer's decision in that regard is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]).

[14] Issues of procedural fairness, on the other hand, do not require deference from this Court with regards to the approach adopted by the officer (*Dunsmuir*, above at para 50; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339).

[15] The Court notes that the approach put forth by the Supreme Court of Canada in *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*], states that questions involving the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], do not necessarily automatically mandate for the application of the correctness standard. Such an approach would result in applying the correctness standard to, and in effect retrying, every case that involves *Charter* values. The Supreme Court of Canada indicated the following in *Doré*, above at paras 36, 43:

> [36] As explained by Chief Justice McLachlin in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567, the approach used when reviewing the constitutionality of a law should be distinguished from the approach used for reviewing an administrative decision that is said to violate the rights of a particular individual (see also *Bernatchez*). When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. *Dunsmuir* tells us this should attract deference (para. 53; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3, at para. 39). When a particular "law" is being assessed for *Charter* compliance, on the other hand, we are dealing with principles of general application.
>
> …
>
> [43] What is the impact of this approach on the standard of review that applies when assessing the compliance of an administrative decision with *Charter* values? There is no doubt that when a tribunal is determining the constitutionality of a law, the standard of review is correctness (*Dunsmuir*, at para. 58). It is not at all clear to me, however, based on this Court's jurisprudence, that correctness should be used to determine whether an administrative decision-maker has taken sufficient account of *Charter* values in making a discretionary decision.
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> [Emphasis added]

[16] The issue of whether or not the Regulations violate the applicant's rights to equality pursuant to subsection 15(1) of the *Charter* was not before the officer, and is therefore not being "reviewed" by this Court. It also concerns a general application of the law, an analysis the Court can undertake without deference.

Arguments

Applicant's arguments

[17] The applicant submits that the officer erred by ignoring significant evidence; namely, his ASL scores, which he submitted along with his application. According to the applicant, the officer failed to consider this important evidence, and failed to explain how she dealt with the speaking and listening abilities in her decision. According to the applicant, this is problematic in the application of subparagraph 87.1(2)(*b*)(ii) of the Regulations in force at the time, which requires a score of 5 on all four (4) abilities, or a score of 4 for any one (1) ability, a score of 5 or higher for any other two (2) abilities, and a score of 6 or higher for the remaining ability.

[18] The applicant also argues that the officer erred by not considering him under the federal skilled workers class. Although he acknowledges having submitted only a Schedule 8 form for the Canadian experience class, he contends that the officer should have followed up with him and clarified under which class he wanted to be assessed. The applicant contends that this is particularly the case because of the ambiguity on his Generic Application Form IMM 0008, where he simply indicated "skilled worker" (a Division in the Regulations which encompasses both the federal skilled workers class and the Canadian experience class, amongst others). The applicant submits that he could have benefited from the more nuanced evaluation provided in the legislative

framework for federal skilled workers, along with subsection 76(3) of the Regulations which provides for a substituted evaluation when the points are an insufficient indicator of the likelihood of economic establishment. The applicant claims this constitutes a breach in procedural fairness.

[19] With regards to the *Charter* issue, the applicant contends that both the officer's decision applying the Regulations, as well as the Regulations themselves as they are drafted, violate his subsection 15(1) *Charter* rights to equality:

EQUALITY RIGHTS	DROITS A L'EGALITE
Equality before and under law and equal protection and benefit of law	Égalité devant la loi, égalité de bénéfice et protection égale de la loi
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	**15.** (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[20] The applicant argues that the officer violated his section 15 rights by not subsuming his ASL results into the official language proficiency required by the Regulations and that the requirements to read, listen, speak and write contained in paragraph section 87.1(2)(*b*) of the Regulations in force at the time of the decision violate his subsection 15(1) *Charter* rights.

[21] The applicant argues that deaf persons have been repeatedly recognized by the courts as a disadvantaged minority in Canada (citing *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577). He claims that the law creates a distinction based on disability due to the requirement to speak and listen in former paragraph 87.1(2)(*b*) of the Regulations, and that no deaf person could ever succeed in obtaining permanent residency under the Canadian experience class as the Regulations are drafted. The applicant claims that the other two (2) assessed abilities, "read" and "write", are also necessarily impaired by the inability to speak and listen in a society predominantly disposed towards hearing persons, particularly when learning a second language. The applicant also indicates that the respondent has failed to designate any institution or organization such as the Canadian Hearing Society, which could assess a deaf person's expressive and receptive ASL abilities. According to the applicant, the respondent has infringed his *Charter* rights by failing to draft or interpret legislation that treats his fluency in ASL as equivalent to fluency in English.

[22] The applicant finally raises *Charter* issues with regards to sections of the Act relating to the federal skilled workers class, under which he was not assessed because he did not apply under that class (sections 75 to 83 of the Regulations).

Respondent's arguments

[23] According to the respondent, the sole issue in this case is whether the officer's decision was reasonable. The respondent argues that the applicant's application contained a clear indication of which class he wished to be considered for since it included a Schedule 8, mandatory for the Canadian experience class, and not a Schedule 3, which is mandatory for the federal skilled workers

class. According to the respondent, it is CIC's policy to accept applications for processing despite minor errors, and the officer was therefore required to accept the application as a complete Canadian experience class application.

[24] The respondent argues that the officer did not consider the applicant's ASL results because they were irrelevant since he had already failed the language requirements on the basis of the reading and writing tests. Since the Regulations do not provide a points scheme whereby two (2) scores below a CLB of 5 can result in a successful application, it was not necessary to consider the ASL results. Because the applicant's failure to meet the reading and writing standards were fatal to his claim, the respondent contends that it was reasonable for the officer to reject the claim on that basis.

[25] Relying on the observations of this Court in *Worthington v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1546, 258 FTR 102, aff'd 2006 FCA 30, 346 NR 312 [*Worthington*]), the respondent submits that this application does not raise a *Charter* issue because there was no evidence before the officer that the applicant's abilities to read and write were negatively impacted by his deafness. Indeed, the respondent argues that the applicant's argument is predicated on the notion that he was treated adversely as a result of being deaf, but that the evidentiary basis for this argument was not established. Since no evidence was placed before the officer that his inability to meet the standards in reading and writing was due to his deafness, the respondent submits that there was no need for the officer to consider how to accommodate the applicant, and no need for this Court to evaluate whether the officer failed in doing so.

[26] The respondent contends that the officer had no discretion to ignore the requirements imposed by the Regulations, and that the applicant did not request consideration on humanitarian and compassionate (H&C) grounds before the officer. Because the applicant did not provide information regarding Russian schooling to the officer, but only in his affidavit before this Court, the officer was not required to consider H&C grounds and was without evidence that the applicant would suffer unusual, undeserved or disproportionate hardship if required to return to Russia. According to the respondent, it is not open to the applicant to raise this argument now in his application for judicial review.

Analysis

Administrative law issues

[27] The Court will first examine the administrative law issues raised by the applicant. The applicant's argument according to which the officer did not take into consideration an important element of evidence – namely, his ASL scores – must fail. Indeed, the officer's notes clearly show that she was aware of the applicant's deafness and of his high ASL scores (Tribunal Record, p 2). The officer's notes are part of her reasons for decision (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4^{th}) 193). The officer considered the ASL scores, as well as the reading and writing scores, which were equal to and lower than the prescribed CLB of 4, respectively. It was reasonable for the officer to come to the conclusion that the applicant did not meet the language requirements based on these two (2) results alone. Indeed, given the points system prescribed by the regulatory framework at the time, and the absence of discretion under the Canadian experience class, it was impossible for the officer to accept the applicant's application with the scores he obtained on the reading and writing tests, regardless of his score on

speaking/expressive and listening/receptive abilities. The record also shows that the applicant's representative's letter enclosed with the application acknowledges that the ASL results are equivalent to spoken and comprehended English (Tribunal Record, p 109).

[28] The Court notes that the applicant only submitted a Schedule 8 form for an application under the Canadian experience class, and no Schedule 3 form for the federal skilled workers class. The Court can therefore find no error in the officer's decision to assess the applicant under the Canadian experience class – the only class for which the applicant provided a complete application. It would be imposing a heavy administrative burden on immigration officers to require them to assess applicants not only under the class for which they applied, but also under possible other classes to determine if the outcome there would be more successful. Contrary to the applicant's assertion, the officer did not engage in "cherry picking" of a class under which to evaluate the applicant, but evaluated the applicant in the only class for which his application was complete.

[29] The Court finds that the officer did not err by assessing the applicant under the Canadian experience class, and only under the Canadian experience class, since this was the only form submitted by the applicant (Tribunal Record, Schedule 8, pp 99-101). The presence of this form, and the absence of the mandatory Schedule 3 for the federal skilled workers class, dispelled any ambiguity that might have arisen from the applicant's use of imprecise wording on his general application form. The applicant has not convinced this Court that the officer had a duty to contact him to perfect his application. There is no breach in procedural fairness.

Subsection 15(1) Charter violation

[30] A subsection 15(1) claim involves a two-part test established by jurisprudence as follows: i) Does the law create a distinction based on an enumerated or analogous ground? and ii) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (*Withler v Canada (Attorney General)*, 2011 SCC 12 at para 30, [2011] 1 SCR 396 [*Withler*]; *R v Kapp*, 2008 SCC 41 at para 17, [2008] 2 SCR 483). The Supreme Court of Canada in *Withler*, above at para 2, also stated that "[a]t the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?"

[31] The Court first recalls the importance of a strong factual background for allegations of *Charter* violations, as illustrated by the following comment set forth by Justice Layden-Stevenson in *Worthington*, above at paras 24-25 :

> [24] The mere existence of a constitutional question does not mean that the court is obliged to determine it. It is an established practice in Canadian law that, if a judge can decide a case without dealing with a constitutional issue, he or she should do so: R.J. Sharpe, K.E. Swinton and K. Roach, *The Charter of Rights and Freedoms*, 2nd ed. (Toronto: Irwin Law, 2002) at p. 97. It is incumbent on the court to ensure that a proper factual foundation exists before measuring legislation against the provisions of the Charter, particularly where the effects of impugned legislation are the subject of the attack: *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 at 1099. Adjudicative facts are those that concern the immediate parties. They are specific and must be proved by admissible evidence: *ibid*. Charter decisions should not and must not be made in a factual vacuum. To do so would trivialize the Charter and inevitably result in ill-considered opinions. The absence of a factual base is not just a technicality that can be overlooked, it is a flaw that is fatal: *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at 361.
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> [25] This application is fraught with difficulties, the nature of judicial review being one of them. Judicial review proceedings are narrow in scope. Their essential purpose is the review of decisions for the purpose of assessing their legality. The reviewing court [absent exceptional

> circumstances not applicable here] is bound by the record that was before the judge or the board. Fairness to the parties and the court or tribunal under review dictates such a limitation: *Bekker v. Canada* (2004), 323 N.R. 195 (F.C.A.) (*Bekker*). The reviewing court must proceed on the record as it exists, confining itself to the criteria for judicial review: *McKenna, supra,* at paragraph 6.
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> [Emphasis added.]

[32] In *MacKay v Manitoba*, [1989] 2 SCR 357, [1989] SCJ No 88 (QL) at para 9, referred to in the excerpt above, the Supreme Court of Canada had indicated the following:

> [9] Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

[33] In the present case, the Court is of the view that the evidence in support of the applicant's *Charter* argument is insufficient.

[34] For instance, the applicant presented this Court with no evidence as to why the ASL scores should replace, or have more weight than the reading and writing abilities. Also, the applicant argues that the Regulations do not "take into account the impairment on written language skills suffered by some Deaf persons due to an education system that disadvantages them due to attitudinal barriers" (Application Record, Applicant's Memorandum of Fact and Law, p 25, para 23). However, there is no evidence that deaf persons would have greater difficulty reading and writing than non-deaf persons, other than the applicant's personal experience with the primary school system in Russia.

[35] Accordingly, the Court will not examine the applicant's arguments in that regard since the officer did not apply these provisions to him. Arguments of *Charter* violations will not be examined in a legal and factual vacuum (*Worthington*, above).

[36] Given the factual pattern of this case and the lack of evidence adduced by the applicant with regard to the alleged violation of his section 15 *Charter* right to equality, the Court must decline to address the *Charter* question raised by the applicant.

[37] The parties did not propose any question of general importance to be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. No question of general importance is certified.

"Richard Boivin"

Judge

Annex

Immigration and Refugee Protection Act, SC 2001, c 27:

Selection of Permanent Residents	*Sélection des résidents permanents*
…	[…]
Economic immigration	Immigration économique
12. (2) 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.	**12**. (2) La sélection des étrangers de la catégorie « immigration économique » se fait en fonction de leur capacité à réussir leur établissement économique au Canada.

Immigration and Refugee Protection Regulations, SOR/2002-227 in force at the time of the decision:

Canadian Experience Class	*Catégorie de l'expérience canadienne*
Class	Catégorie
87.1 (1) For the purposes of subsection 12(2) of the Act, the Canadian experience class is prescribed as a class of persons who may become permanent residents on the basis of their experience in Canada and who intend to reside in a province other than the Province of Quebec.	**87.1** (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie de l'expérience canadienne est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur expérience au Canada et qui cherchent à s'établir dans une province autre que le Québec.
Member of the class	Qualité
(2) A foreign national is a member of the Canadian experience class if	(2) Fait partie de la catégorie de l'expérience canadienne l'étranger qui satisfait aux exigences suivantes :
…	[…]
(*b*) they have had their proficiency in the English or French language assessed by an organization or institution designated under	*b*) il a fait évaluer sa compétence en français ou en anglais par une institution ou organisation désignée aux

subsection (4) and have obtained proficiencies for their abilities to speak, listen, read and write that correspond to benchmarks, as referred to in *Canadian Language Benchmarks 2000* for the English language and *Niveaux de compétence linguistique canadiens 2006* for the French language, of

(i) in the case of a foreign national who has acquired work experience in one or more occupations that are listed in Skill Type 0 Management Occupations or Skill Level A of the *National Occupational Classification* matrix,

(A) 7 or higher for each of those abilities, or

(B) 6 for any one of those abilities, 7 or higher for any other two of those abilities and 8 or higher for the remaining ability, and

(ii) in the case of a foreign national who has acquired work experience in one or more occupations that are listed in Skill Level B of the *National Occupational Classification* matrix,

(A) 5 or higher for each of those abilities, or

(B) 4 for any one of those abilities, 5 or higher for any other two of those abilities and 6 or higher for the remaining ability.

…

Designated organization

(4) 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

termes du paragraphe (4) et obtenu, pour les aptitudes à parler, à écouter, à lire et à écrire, selon le document intitulé *Niveaux de compétence linguistique canadiens 2006*, pour le français, et le *Canadian Language Benchmarks 2000*, pour l'anglais, les niveaux de compétence suivants :

(i) s'il a une expérience de travail dans une ou plusieurs professions appartenant aux genre de compétence 0 Gestion ou niveaux de compétences A de la matrice de la *Classification nationale des professions*:

(A) 7 ou plus pour chacune des aptitudes,

(B) 6 pour l'une des aptitudes, 7 ou plus pour deux des aptitudes et 8 ou plus pour l'aptitude restante,

(ii) s'il a une expérience de travail dans une ou plusieurs professions appartenant au niveau de compétences B de la matrice de la *Classification nationale des professions*:

(A) 5 ou plus pour chacune des aptitudes,

(B) 4 pour l'une des aptitudes, 5 ou plus pour deux aptitudes et 6 ou plus pour l'aptitude restante.

[…]

Organisme désigné

(4) Le ministre peut désigner les institutions ou organisations chargées d'évaluer la compétence linguistique pour l'application du présent article et,

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.

en vue d'établir des équivalences entre les résultats de l'évaluation fournis par une institution ou organisation désignée et les niveaux de compétence 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 aux niveaux mentionnés à ce paragraphe.

Immigration and Refugee Protection Regulations, SOR/2002-227, currently in force:

General

Criteria

74. (1) For the purposes of paragraphs 75(2)(*d*), 79(3)(*a*), 87.1(2)(*d*) and (*e*) and 87.2(3)(*a*), the Minister shall fix, by class prescribed by these Regulations or by occupation, and make available to the public, minimum language proficiency thresholds on the basis of

(*a*) the number of applications in all classes under this Part that are being processed;

(*b*) the number of immigrants who are projected to become permanent residents according to the report to Parliament referred to in section 94 of the Act; and

(*c*) the potential, taking into account the applicants' linguistic profiles and economic and other relevant factors, for the establishment in Canada of applicants under the federal skilled worker class, the Canadian experience class and the federal skilled trades class.

Dispositions générales

Critères

74. (1) Pour l'application des alinéas 75(2)*d*), 79(3)*a*), 87.1(2)*d*) et *e*) et 87.2(3)*a*), le ministre établit, par catégorie réglementaire ou par profession, les niveaux de compétence linguistique minimaux en se fondant sur les éléments ci-après et en informe le public :

a) le nombre de demandes en cours de traitement au titre de toutes les catégories prévues à la présente partie;

b) le nombre d'immigrants qui devraient devenir résidents permanents selon le rapport présenté au Parlement conformément à l'article 94 de la Loi;

c) les perspectives d'établissement au Canada des demandeurs au titre de la catégorie des travailleurs qualifiés (fédéral), de la catégorie de l'expérience canadienne et de la catégorie des travailleurs de métiers spécialisés (fédéral), compte tenu de leur profil linguistique, des facteurs

économiques et d'autres facteurs pertinents.

Minimum language proficiency thresholds

(2) The minimum language proficiency thresholds fixed by the Minister shall be established in reference to the benchmarks described in the *Canadian Language Benchmarks* and the *Niveaux de compétence linguistique canadiens*.

Niveaux de compétence linguistique minimaux

(2) Les niveaux de compétence linguistique minimaux établis par le ministre sont fixés d'après les normes prévues dans les *Niveaux de compétence linguistique canadiens* et dans le *Canadian Language Benchmarks*.

Designation for evaluating language proficiency

(3) The Minister may designate, for any period specified by the Minister, any organization or institution to be responsible for evaluating language proficiency if the organization or institution has expertise in evaluating language proficiency and if the organization or institution has provided a correlation of its evaluation results to the benchmarks set out in the *Canadian Language Benchmarks* and the *Niveaux de compétence linguistique canadiens*.

Désignation pour l'évaluation de la compétence linguistique

(3) Le ministre peut désigner, pour la durée qu'il précise, toute institution ou organisation chargée d'évaluer la compétence linguistique si l'institution ou l'organisation possède de l'expertise en la matière et si elle a fourni une équivalence des résultats de ses tests d'évaluation linguistique avec les normes prévues dans les *Niveaux de compétence linguistique canadiens* et dans le *Canadian Language Benchmarks*.

…

[…]

Canadian Experience Class

Catégorie de l'expérience canadienne

Class

87.1 (1) For the purposes of subsection 12(2) of the Act, the Canadian experience class is prescribed as a class of persons who may become permanent residents on the basis of their ability to become economically established in Canada, their experience in Canada, and their intention to reside in a province other than the Province of Quebec.

Catégorie

87.1 (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie de l'expérience canadienne est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada et de leur expérience au Canada et qui cherchent à s'établir dans une province autre que le Québec.

Member of the class	Qualité
(2) A foreign national is a member of the Canadian experience class if	(2) Fait partie de la catégorie de l'expérience canadienne l'étranger qui satisfait aux exigences suivantes :
(*a*) they have acquired in Canada, within the three years before the date on which their application for permanent residence is made, at least one year of full-time work experience, or the equivalent in part-time work experience, in one or more occupations that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the National Occupational Classification matrix, exclusive of restricted occupations; and	*a*) l'étranger a accumulé au Canada au moins une année d'expérience de travail à temps plein, ou l'équivalent temps plein pour un travail à temps partiel, dans au moins une des professions, autre qu'une profession d'accès limité, appartenant au genre de compétence 0 Gestion ou aux niveaux de compétence A ou B de la matrice de la Classification nationale des professions au cours des trois ans précédant la date de présentation de sa demande de résidence permanente;
(*b*) during that period of employment they performed the actions described in the lead statement for the occupation as set out in the occupational descriptions of the National Occupational Classification;	*b*) pendant cette période d'emploi, il a accompli l'ensemble des tâches figurant dans l'énoncé principal établi pour la profession dans les descriptions des professions de la Classification nationale des professions;
(*c*) during that period of employment they performed a substantial number of the main duties of the occupation as set out in the occupational descriptions of the National Occupational Classification, including all of the essential duties;	*c*) pendant cette période d'emploi, il a exercé une partie appréciable des fonctions principales de la profession figurant dans les descriptions des professions de la Classification nationale des professions, notamment toutes les fonctions essentielles;
(*d*) they have had their proficiency in the English or French language evaluated by an organization or institution designated under subsection 74(3) and have met the applicable threshold fixed by the Minister under subsection 74(1) for each of the four language skill areas; and	*d*) il a fait évaluer sa compétence en français ou en anglais par une institution ou organisation désignée en vertu du paragraphe 74(3) et obtenu, pour chacune des quatre habiletés langagières, le niveau de compétence applicable établi par le ministre en vertu du paragraphe 74(1);
(*e*) in the case where they have acquired the	*e*) s'il a acquis l'expérience de travail

work experience referred to in paragraph (*a*) in more than one occupation, they meet the threshold for proficiency in the English or French language, fixed by the Minister under subsection 74(1), for the occupation in which they have acquired the greater amount of work experience in the three years referred to in paragraph (*a*).

visée à l'alinéa a) dans le cadre de plus d'une profession, il a obtenu le niveau de compétence en anglais ou en français établi par le ministre en vertu du paragraphe 74(1) à l'égard de la profession pour laquelle il a acquis le plus d'expérience au cours des trois années visées à l'alinéa *a*).

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

GUARANTEE OF RIGHTS AND FREEDOMS

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

…

GARANTIE DES DROITS ET LIBERTES

Droits et libertés au Canada

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

[…]

EQUALITY RIGHTS

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

…

DROITS A L'EGALITE

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-12568-12
STYLE OF CAUSE:	DMITRI ALEXANDROVICH SMIRNOV v MCI
PLACE OF HEARING:	Ottawa, Ontario
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APPEARANCES:

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Max Binnie	FOR THE RESPONDENT

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