Federal Court  Cour fédérale

Date: 20100705

Docket: IMM-5212-09

Citation: 2010 FC 726

Ottawa, Ontario, July 5, 2010

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

ALTHEA RAMOS DE LUNA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Althea Ramos De Luna, the Applicant, applied for a visa to come to Canada as a live-in care worker. A Visa Officer at the Canadian Embassy in Manila, Philippines, refused her application because she did not meet the requirements of the Live-in Care Worker program. She applies to this Court for Judicial Review pursuant to section 18.1 of the *Federal Courts Act*, (R.S.C., 1985, c. F-7).

[2] For reasons that follow, I am denying this judicial review.

BACKGROUND

[3] The Applicant secured an offer of employment in Canada to be a live-in caregiver. Canada recognizes a shortage of such workers and has created the Live-in Caregiver Program to find qualified people who may wish to work as caregivers for Canadians. Those chosen in the program have an opportunity to apply to become permanent residents here. However, they must demonstrate a command of English or French sufficient to perform their work and they must have a demonstrated ability to work as caregivers for children and the elderly in unsupervised settings.

[4] Ms. Ramos de Luna applied to the program from the Philippines. She worked previously as a social welfare officer for six years in the Philippines where she says she used English regularly. She pursued training at Fil-Can Training School for six months in 2007/2008 geared towards live-in care. She also spent a month and a half studying at Nursing Resource Centre Inc. The Applicant contends these experiences demonstrate her proficiency in English and have equipped her with the necessary knowledge and skills to be a live-in caregiver in Canada.

[5] Visa officers review applications under this program. Where an officer is not satisfied the applicant's language skills are sufficient, the officer is expected to interview the applicant in an effort to ascertain their language skills. This expectation is contained in the guidelines in OP 14 Processing Applications for the Live-in Caregiver Program and it is expressed this way:

> "If an officer has a reason to doubt the applicant's language ability, then the officer should interview the applicant.
>
> The officer should carefully document how language ability was assessed in refusal cases".

Further, it reads:

> "Live-in caregivers must have a level of fluency in English or French that enables them to communicate effectively and independently in an unsupervised setting. For example, they should be able to:
>
> - Respond to emergency situations by contacting a doctor, ambulance, police or fire department;
> - Read the labels of medications;
> - Answer the telephone and the door; and
> - Communicate with others outside the home, such as schools, stores or other institutions."

[6] In this case, the Visa Officer was not satisfied with the Applicant's ability in English and instead of interviewing her, relied on a service provider that conducts a Spoken Proficiency in English Assessment and Knowledge or S.P.E.A.K. test.

[7] The S.P.E.A.K. test is conducted by asking the applicant a series of five questions. The first is meant to put an applicant at ease, the rest are specific questions related in some way to the provision of care. The service provider offers a rating of the applicant's skill, but also a transcript of the answers and a DVD with a recording of the applicant's answers.

[8] In the Applicant's case, she was asked:

> "What will you do in case a fire breaks out in your client's house?"

> "How do you make or change the sheets while your bedridden client is lying on the bed?"
>
> The test includes a written section with multiple choice questions, including:
>
> "Which statement is NOT TRUE about Tuberculosis? Give the letter of your answer and read its corresponding statement. Then give at least 2 signs and symptoms of Tuberculosis.
>
> A. Tuberculosis is a disease caused by bacteria.
> B. Tuberculosis is seen only in poor people.
> C. Coughing into a tissue decreases the spread of the disease.
> D. Tuberculosis is spread by people.

[9] The Applicant gave non-responsive answers to the long questions and erroneous selections on the multiple choice questions. The Officer rejected Ms. Ramos de Luna's application for a visa.

RELEVANT LEGISLATION

Immigration and Refugee Protection Regulations, (SOR/2002-227)

112. A work permit shall not be issued to a foreign national who seeks to enter Canada as a live-in caregiver unless they (a) applied for a work permit as a live-in caregiver before entering Canada; (b) have successfully completed a course of study that is equivalent to the successful completion of secondary school in Canada; (c) have the following training or experience, in a field or occupation related to the employment for which the work permit is sought, namely, (i) successful completion of six	112. Le permis de travail ne peut être délivré à l'étranger qui cherche à entrer au Canada au titre de la catégorie des aides familiaux que si l'étranger se conforme aux exigences suivantes : a) il a fait une demande de permis de travail à titre d'aide familial avant d'entrer au Canada; b) il a terminé avec succès des études d'un niveau équivalent à des études secondaires terminées avec succès au Canada; c) il a la formation ou l'expérience ci-après dans un

months of full-time training in a classroom setting, or (ii) completion of one year of full-time paid employment, including at least six months of continuous employment with one employer, in such a field or occupation within the three years immediately before the day on which they submit an application for a work permit; (d) have the ability to speak, read and listen to English or French at a level sufficient to communicate effectively in an unsupervised setting; and (e) have an employment contract with their future employer. … 200 (3) An officer shall not issue a work permit to a foreign national if (a) there are reasonable grounds to believe that the foreign national is unable to perform the work sought;	domaine ou une catégorie d'emploi lié au travail pour lequel le permis de travail est demandé : (i) une formation à temps plein de six mois en salle de classe, terminée avec succès, (ii) une année d'emploi rémunéré à temps plein — dont au moins six mois d'emploi continu auprès d'un même employeur — dans ce domaine ou cette catégorie d'emploi au cours des trois années précédant la date de présentation de la demande de permis de travail; d) il peut parler, lire et écouter l'anglais ou le français suffisamment pour communiquer de façon efficace dans une situation non supervisée; e) il a conclu un contrat d'emploi avec son futur employeur. … 200 (3) Le permis de travail ne peut être délivré à l'étranger dans les cas suivants : a) l'agent a des motifs raisonnables de croire que l'étranger est incapable d'exercer l'emploi pour lequel le permis de travail est demandé;

Federal Courts Act,

18.1(3) On an application for judicial review, the Federal Court may (a) order a federal board, commission or other tribunal to	18.1 (3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut : a) ordonner à l'office fédéral en cause d'accomplir tout acte

do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
(e) acted, or failed to act, by reason of fraud or perjured evidence; or
(f) acted in any other way that was contrary to law.

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
f) a agi de toute autre façon contraire à la loi.

ISSUES

[10] The Applicant raises the following issues:

a. Did the Visa Officer err in law in the exercise of his or her duties by ignoring evidence and misconstruing evidence?

b. Was the Applicant denied fundamental and natural justice and treated unfairly by the conduct of the visa officer in this case?

c. Did the Visa Officer fetter his or her discretion by refusing to take into account relevant circumstances?

d. Did the Visa officer err in law in making his or her decision in that he or she misapplied the requirements and criteria set out in the *Immigration and Refugee Protection Regulations* pertaining to a live-in caregiver?

STANDARD OF REVIEW

[11] The Applicant is most concerned with the Visa Officer's findings with respect to the S.P.E.A.K. test and his refusal to recognize the Applicant's educational experience. These are findings of fact and mixed findings of fact and law. The Applicant also submits the Visa Officer's decision was deficient with respect to his duty of procedural fairness. Reviewing whether the duty of procedural fairness was observed is a question of law.

[12] The appropriate standard of review for findings of fact and law by a visa officer is reasonableness. This Court has found *Malik v. Minister of Citizenship and Immigration*, 2009 FC 1283:

> "The decisions of visa officers relating to determinations of eligibility for permanent residence under the federal skilled worker class are normally reviewed on a standard of reasonableness: Hua v. Canada (Minister of Citizenship and Immigration), 2004 FC 1647, [2004] F.C.J. No. 2106 (QL) at para. 28; Kniazeva v. Canada (Minister of Citizenship and Immigration), 2006 FC 268, [2006] F.C.J. No. 336 (QL) at para. 15; Tiwana v. Canada (Minister of Citizenship and Immigration), 2008 FC 100, [2008] F.C.J. No.118 at para.15; Hameed v. Canada (Minister of Citizenship and Immigration), 2008 FC 271, [2008] F.C.J. No. 341 at para. 22."

[13] Issues of natural justice and procedural fairness are reviewed on the basis of the standard of correctness: *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at para. 43. As noted by the Federal Court of Appeal in *Skechley v. Canada (Attorney General)*, 2005 FCA 404, [2005] F.C.J. No.2056 (QL) at para. 53:

> CUPE [Canadian Union of Public Employees v. Ontario (Minister of Labour), [2003] 1 S.C.R. 539, 2003 SCC 29] directs a court, when reviewing a decision challenged on the grounds of procedural fairness, to isolate any act or omission relevant to procedural fairness (at para. 100). This procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty.

ANALYSIS

[14] The Applicant contends the Visa Officer did not follow Operational Procedures set out by the Minister with respect to assessing documents, knowledge and language skills. The same grounds are relied on for the contention the officer also fettered his discretion. The Applicant adds the decision provide insufficient reasons. And, finally, the Applicant argues she was deprived of an opportunity to address her poor performance in the S.P.E.A.K.

[15] I consider the issues concerning documents, knowledge and language skills as questions of fact and the issues related to the lack of an opportunity to address her poor result in the S.P.E.A.K. test as a question of a duty of procedural fairness.

[16] The Applicant contends the Visa Officer overlooked or did not properly consider the credentials she obtained in the Philippines. These include a six month course at the Fil-Can Training School in 2007, one and a half months at the Nursing Resource Centre Inc., English courses at Sacred Heart College between 1994 and 1998. In addition to these educational achievements, the Applicant was a social worker for six years in the Philippines and used English in this role.

[17] The Applicant argues the Visa Officer would have arrived at a different conclusion with respect to her language and knowledge had he considered her credentials and experience. The Visa Officer did consider her credentials since he refers to these in his CAIPS notes.

[18] The S.P.E.A.K. results speak for themselves. The Applicant's answers to the long questions were general, her sentences incomplete and they belied her misunderstanding of the language. For example, when asked about a fire, she said she would bring her client to the hospital. When asked about changing sheets for a bedridden client she explained the process of using a bedpan. She answered: "Turn the patient into the other side…place the bedpan over the patient…this is the time to remove the clothing…gain access on the patient…use a disposable wipes clothing…to clean…get the dress…to change my patient…clean soap and water to clean…my patient…" In the

multiple choice section, the Applicant gave A as her answer, (the only statement that is not true is B) and her examples of signs and symptoms were general to many diseases; she didn't provide examples more specific to tuberculosis.

[19] The S.P.E.A.K. test represents a standardized test designed to assess the knowledge and language skills required by the Live-In Caregiver program. The Officer was provided with the test performance in the form of a DVD and a written transcript of the question and answer session. He indicates that he reviewed this information in coming to his own decision concerning the Applicant's skills. A video recording and transcript of a standard test which engaged the Applicant in English on the very skills and knowledge she was required to demonstrate is a graphic and reliable indicator of her abilities. It was reasonable for the Officer to rely on the direct output from the S.P.E.A.K test (The DVD and transcript) to make his assessment.

[20] Given the material before him, which I am satisfied he considered, I find the Visa Officer's conclusions about the Applicant's language skills and knowledge about caregiving were reasonable.

[21] The Applicant argues the Visa Officer breached his duty of procedural fairness by not providing her with an opportunity to dispute the outcome of the test. She provides a series of cases arguing adverse evidence should be brought to the attention of an applicant so that he or she may have the opportunity to explain or rebut it. I agree that in many cases applicants should benefit from an opportunity to correct, explain or rebut evidence that might undermine their application. However, this is not one of those cases.

[22] In *Muliadi v. Canada (Minister of Employment & Immigration)*, [1986] 2 F.C. 205 (C.A.) the visa officer considered a negative assessment by a provincial organization of a man's business proposal which formed part of his application for permanent residence in Canada as an entrepreneur. The Court of Appeal found for the applicant because he was never given a fair opportunity to reply to this assessment. In the case before me the assessment is quite different. Ms. Ramos de Luna participated in the S.P.E.A.K. test and the assessment of her skills was based purely on her contemporaneous ability to demonstrate them by answering questions in English on topics she has presumably studied. This is quite different from the situation in *Muliadi* where provincial business experts assessed the prospects of an applicant's business plan without the applicant's involvement.

[23] The other cases cited by the Applicant are concerned with an obligation on visa officers to indicate to applicants when there is insufficient proof to establish claims in their applications. These cases are also quite different from the one before me.

[24] Given the Applicant's participation in the S.P.E.A.K. test, no breach of procedural fairness arises on the Visa Officer's evaluation of the test in reliance on the materials produced. The Applicant has not made out a case for a breach of procedural fairness.

CONCLUSION

[25] The application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application is dismissed.

2. I make no order as to costs.

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5212-09
STYLE OF CAUSE:	ALTHEA RAMOS DE LUNA and MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 3, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	MANDAMIN, J.
DATED:	JULY 5, 2010

APPEARANCES:

Donald Greenbaum	FOR THE APPLICANT
Nicole Rahamen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Donald M. Greenbaum	APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT