

Federal Court



Cour fédérale

Date: 20121113

Docket: IMM-5929-11

Citation: 2012 FC 1319

Ottawa, Ontario, November 13, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

LUSINE PETROSYAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review, pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) of a decision by an Immigration Program Manager (the Officer) at the Canadian embassy in Moscow. For the reasons that follow the application is granted.

Background

[2] In a decision, dated August 12, 2011, the Officer concluded that the applicant did not meet the requirements to be eligible for permanent resident status in Canada under the Federal Skilled Worker (FSW) class.

[3] The applicant was born on July 8, 1980 and is a citizen of Armenia. On April 22, 2010 she applied for permanent residency under the FSW class based on having more than one year experience working in the job categories NOC 0611 (Telecommunications) and NOC 0213 (Computer and Information Systems managers). Only the latter is at issue in this review.

[4] The applicant worked as Assistant of Vice-President at the National Academy of Sciences of the Republic of Armenia full time from 2003-2008. Her duties are described in the reference letter as dealing with many different information technology and computer science projects including artificial linguistics, managing teams of personnel, conducting research and preparing for academic conferences.

[5] According to the Computer Assisted Immigration Processing System (CAIPS) notes, the applicant's application was assessed by a service delivery agent and deemed eligible for processing on January 18, 2010 on the basis that she met the requirements of NOC 0213. The application was assessed on August 9, 2010 and she was awarded 69 points, more than the minimum of 67. The agent who assessed the application noted concerns with the applicant's work experience as to why an assistant performed information systems manager duties.

[6] Subsequently, a different agent noted on August 23, 2010 that the applicant has a bachelor's degree in linguistics and translation and no formal training in information systems management. This agent noted that her work book indicated she was a Second Level Specialist and Manager of Technology while her reference letter described her as an assistant of the vice president – the agent questioned the record and/or the accuracy of the translation of the reference letter.

[7] The Officer interviewed the applicant on April 1, 2011. The applicant's account differs from the notes subsequently entered by the Officer into CAIPS on May 3, 2011. The applicant's evidence was that at the outset of the interview the Officer told her that her application would be refused because she did not have the technical education required in NOC 0213. The applicant claims the Officer carried on a conversation in French to a colleague during the interview and her notes in CAIPS were inaccurate or incomplete in several respects, especially regarding her job duties. The applicant believed after the interview that the only concern was with her technical education and was surprised when her rejection letter stated she did not have the work experience.

[8] The Officer's notes include a rough outline of the conversation and a conclusion that the applicant did not have one year of experience. The applicant's rejection letter dated August 12, 2011 concluded that she did not have the required work experience.

[9] The Officer filed an affidavit in this Court. The Officer responds to the claims made by the applicant in her affidavit, and states that her interview notes were complete and not altered in the month before they were entered into CAIPS. She also claims to not have commented on a lack of

the applicant's education. Applicant's counsel cross-examined the Officer by teleconference on March 26, 2012 and filed the transcript in this Court.

Issues and Standard of Review

[10] The central issues to be determined on this application are whether the Officer breached the duty of fairness by failing to notify the applicant of her concerns and, secondly, whether the Officer erred by determining that she was not eligible for FSW processing.

[11] The assessment of a FSW application attracts the standard of reasonableness: *Porfirio v Canada (Minister of Citizenship and Immigration)*, 2011 FC 794, 99; *Bondoc v Canada (Minister of Citizenship and Immigration)*, 2008 FC 842.

Discussion

[12] The applicant contended that the Officer took the education requirement of the NOC description into account, which is irrelevant based on *Patel v Canada (Minister of Citizenship and Immigration)*, 2007 FC 441.

[13] At the screening stage, the agent stated:

SHARE CONCERNS IDENTIFIED BY CASE ANALYST. PA HAS NEVER HAD ANY FORMAL TRAINING IN INFO SYSTEMS MANAGEMENT. HER BACKGROUND IS LINGUISTICS. TRANSLATOR/INTERPRETOR [sic] BY DIPLOMA.

[14] At the interview, the Officer told the applicant that she was going to refuse her application because she did not have any formal education in IT management. The CAIPS notes also show that the Officer asked about her formal education.

[15] Counsel for the applicant sent a letter to the visa post outlining her position that educational requirements in NOC descriptions are not relevant, as per *Patel*. No response was received.

[16] The applicant left the interview believing that the Officer was only concerned with her education, so submissions were made on that issue alone. The CAIPS notes were silent on the Officer's concerns that she did not meet the experience requirement. Applicant's counsel obtained the CAIPS notes but the Officer's notes were not entered into CAIPS for more than a month after the interview. The Applicant's counsel sent a letter requesting reasons to determine the Officer's concern but no reasons were provided.

[17] There is no merit to the applicant's argument that her application was refused because of her education. She was refused because the Officer was not satisfied that she had the requisite experience. This is evident from the CAIPS notes, the Officer's affidavit and cross-examination.

[18] The Officer did not advise the applicant that her application was being refused because of her education as alleged by the applicant. The Officer made her own assessment and did not rely on the concern of a previous agent included in the CAIPS notes. The applicant disputes the CAIPS notes regarding what was said at the interview. On these facts, more weight should be given to the interview notes than the applicant's affidavit: *Sellappa v Canada (Minister of Citizenship and*

Immigration), 2011 FC 1379, paras 70-71. The Officer's affidavit attests that the CAIPS notes of the interview were made contemporaneously to the interview and were only entered into CAIPS at a later date.

[19] The content of the duty of fairness owed to visa applicants is at the low end of the procedural fairness spectrum: *Yao v Canada (Minister of Citizenship and Immigration)*, 2009 FC 114; *Patel v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 55. An officer is not required to give notice of a concern that an applicant lacks the work experience of a NOC because that concern arises directly from the *IRPA's Regulations (Immigration and Refugee Protection Regulations (SOR/2002-227))*, nor is an applicant entitled to a running score of the application: *Kamchibekov v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1411; *Shah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 697; *Gulati v Canada (Minister of Citizenship and Immigration)*, 2010 FC 451; *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283.

[20] The applicant asks the Court to re-weigh the evidence as to whether or not she performed the NOC duties. This raises no reviewable error unless the decision is unreasonable. The burden is on applicants to satisfy officers that they meet the requirements of the *IRPA* for admission to Canada.

[21] The Officer's assessment was reasonable. The CAIPS notes show that the applicant could not explain what her duties were. It is not disputed that the Officer gave the applicant the opportunity to explain her job duties.

[22] The applicant properly argues that the jurisprudence is clear that FSW applicants are not required to exhibit every “main duty” described in a NOC, and that the wording of the duties is to be construed broadly: *Chen and Hussain*.

[23] However, the applicant has not demonstrated that the Officer committed an error in this regard. Instead, as the respondent points out, the Officer found that the applicant could not explain what her duties were and therefore could not demonstrate that she fulfilled the NOC duties. The applicant bears the burden of demonstrating to the Officer’s satisfaction, with requisite evidence, that they satisfy the requirements of being granted permanent residency: *Baybazarov v Canada (Minister of Citizenship and Immigration)*, 2010 FC 665.

[24] The respondent also points to the cross-examination of the Officer to demonstrate that the applicant was given full opportunity to respond and explain her job duties. Although the Officer stated that she did not ask the applicant directly and individually how she satisfied each main duty of the NOC, she came to her opinion based on the overall content of the interview. The applicant has not demonstrated that the Officer erred in this regard either.

[25] It is well understood that the adequacy of reasons is not an independent ground of judicial review: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708. It is equally well recognized that to the extent that the duty to give reasons is informed by the nature of the right involved and the context, the duty is at the low end of the spectrum.

[26] The reasons here meet, but just barely, the standard. They indicate concern about the relevance of her work experience. The CAIPS entry of August 23, 2010 notes:

(...) DUTIES ARE VAGUE AND VERSATILE AND BASED ON THIS LETTER, I AM NOT SATISFIED THAT PA PERFORMS SUFFICIENT NUMBER OF MAIN DUTIES IN NOC0213.

INT IS REQUIRED FOR SEL/DEC WITH PA ONLY.

[27] Following the interview, in Armenia, the Officer noted in CAIPS:

I explained the description of NOC 0213. Asked her to explain how she has the experience in this occupation. PA unable to explain. PA also claims one year experience as NOC 0611 Telecommunications. Once again no evidence to prove that she has fulfilled the duties of 0611. She could not respond except to say that she was in Information Systems Manager.

[28] The Officer did not ask the applicant whether she had experience in the relevant duties, rather, she came to her conclusion based on the overall content of the interview.

[29] This is something which an officer is entitled to do. Vague and unhelpful answers do not shift the onus to the officer. Where, however, there is, on the face of the record, evidence which suggests that many of the duties had been performed, the officer needs to be more express as to the reasons for the conclusion. A simple statement “unable to explain” is insufficient, particularly where language is not an issue.

[30] The case thus falls squarely within the principle expressed by Justice Mosley in *Gulati v Canada (Citizenship and Immigration)*, 2010 FC 451:

It is impossible to assess the officer's conclusion, that the applicant had not performed a substantial number of the main duties of NOC 6212, without knowing which duties the officer thought had not been performed and why.

According to *Dunsmuir [v New Brunswick]*, 2008 SCC 9, [2008] 1 SCR 190, at paragraph 47, the transparency and intelligibility of a decision are important elements of a reasonableness analysis. I conclude that their absence in the present decision render it unreasonable.

[31] An officer confronted with vague and unspecific answers is free to reject an application. It would be eminently reasonable to do so. Nor is it the officer's obligation to articulate the link between the experience and the duties of the NOC. That is the applicant's burden. However, a mere statement "unable to explain" does not satisfy the minimum requirements of providing reasons that satisfy the duty to provide minimal reasons.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted. The matter is referred back to a different visa officer for reconsideration. There is no question for certification.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-8504-11

STYLE OF CAUSE: LUSINE PETROSYAN v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto

DATE OF HEARING: September 26, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** RENNIE J.

DATED: November 13, 2012

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