Federal Court  Cour fédérale

Date: 20130729

Docket: IMM-5636-12

Citation: 2013 FC 828

Ottawa, Ontario, July 29, 2013

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

ARMAGHAN ESHRAGHIAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This judicial review concerns the educational qualifications of the Applicant in respect of her application for permanent residence in the "federal skilled worker class".

[2] These proceedings also had to address the Respondent's attempt to introduce an affidavit from a Citizenship officer – Lacasse – who was not the officer who denied the application.

II. BACKGROUND

[3] The Applicant has a medical degree from an Iranian university after studying for seven years. The medical degree is the first degree that the Applicant obtained.

[4] The Citizenship Officer [Officer] awarded the Applicant 20 points out of a possible 25 points for the educational component of her application. In total, the Applicant was 2 points short of the required 67 points required to qualify under this class of permanent residence.

[5] The Applicant's evidence of educational qualifications included a statement by the head of the Hormogozan University of Medical Sciences indicating that the medical doctorate degree in Iran is at least equivalent to a Master's degree "based on IRI Educational System".

[6] Had that statement been accepted by the Officer, the Applicant would have been awarded 25 points – 3 points more than required for admission.

[7] The Officer's conclusion with respect to this evidence was:

> The statement does not evidence that the degree is from a school of graduate studies, nor provide any basis for the conclusion of a Master's degree equivalency. A statement of equivalency without satisfactory supporting evidence does not change the points awarded.

[8] The Applicant raises two issues in this judicial review:

(1) the breach of procedural fairness in not affording the Applicant an opportunity to address the challenge to the statement of equivalency; and

(2) the reasonableness of the decision in not awarding the proper points for her education.

III. ANALYSIS

[9] There is no issue that the standard of review for the issue of breach of procedural fairness is correctness and that in respect of the merits of the decision, reasonableness is the standard of review.

[10] The Applicant relies on Justice Mosley's decision in *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283, [2007] 3 FCR 501, at paragraph 24, to assert that the Officer's rejection of the equivalency evidence was based on "credibility, accuracy or genuine nature of information submitted" which therefore gives rise to the right to a hearing to address concerns raised.

> [I]t is clear that where a concern arises directly from the requirements of the legislation or related regulations, a visa officer will not be under a duty to provide an opportunity for the applicant to address his or her concerns. Where however the issue is not one that arises in this context, such a duty may arise. This is often the case where the credibility, accuracy or genuine nature of information submitted by the applicant in support of their application is the basis of the visa officer's concern, as was the case in *Rukmangathan*, and in *John v. Canada (Minister of Citizenship & Immigration)* [2003 CarswellNat 1466 (Fed TD)] and *Cornea v. Canada (Minister of Citizenship & Immigration)* [2003 CarswellNat 2433 (FC)] cited by the Court in *Rukmangathan*, above.
>
> [Emphasis by Applicant]

[11] The Respondent's position is that the issue was one of sufficiency of evidence – that there was no satisfactory supporting evidence for the statement of equivalency and thus no issue of procedural fairness arises.

[12] The Applicant also relies on the doctrine of legitimate expectation arising from OP-6 – Overseas Processing Manual. OP-6 requires that officers assess programs of study and award points based on the standards that exist in the country of study.

[13] The Officer's decision was not a violation of the requirement to assess studies in the context of the local country. Therefore, there is no issue of legitimate expectation raised in this case.

[14] The Officer's objection to the equivalency evidence is that there was no supporting evidence. In effect, the statement by the head of the university as to equivalency was not satisfactory. The Officer does not say why it is unsatisfactory or what other evidence would be satisfactory.

[15] In short, the Applicant provided the evidence listed in OP-6. The Officer sought to impose some further evidentiary requirement than that found in OP-6.

[16] If the Officer did not find the statement of equivalency credible, the Applicant was entitled to notice and an opportunity to address the concerns. If the Officer was exercising discretion to require further evidence of equivalency beyond that provided in OP-6, again the Applicant was entitled to notice and an opportunity to be heard.

[17] In either event, basic fairness required that the Applicant have an opportunity to address the Officer's concerns about the letter of equivalency. The Respondent has been unable to explain why fairness does not dictate such a result.

[18] As to the reasonableness of the decision, the Officer provided no reasons for finding the equivalency letter inadequate. There is no explanation of what the Officer viewed as supporting evidence. Respondent's counsel suggested that what was required was evidence from some accrediting organization. If that is what the Officer sought, that is not obvious from the decision.

[19] It was unreasonable to reject the university head's equivalency statement or to impose some further evidentiary requirement without providing some reasons for either.

[20] Lastly, I turn to the issue of affidavit evidence – particularly that of Lacasse.

[21] In support of the Applicant's procedural fairness argument, the Applicant submitted an affidavit from her brother purporting to show that had she been given an opportunity to be heard, there was evidence to support the equivalency statement. Evidence for that purpose is legitimate even though in this case not necessarily helpful. It was evidence relevant to procedural fairness.

[22] The Respondent replied by filing the Lacasse affidavit. While it purported to answer the issues of procedural fairness, it was nothing more than a guise under which Lacasse attempted to "bootstrap" the Officer's decision.

[23] Lacasse was a more senior immigration officer than the Officer who decided the application. Lacasse was not involved in the application and based all her comments on her review of the file and her experience with these types of situations in Iran.

[24] The Lacasse affidavit elaborates on the reasons given, redetermines the case (with the same result) and directly comments on the merits of the decision. The following excerpts are representative of the nature of the comments made by Lacasse:

> Based on the documents and information provided in the Application, I am satisfied that the Applicant's medical degree is equivalent to a first-level university credential.
>
> I am informed by Balqees Mihirig, counsel for the Respondent, that the Applicant claims that her medical degree should have been evaluated as equivalent to a Master's degree. The Applicant's claim that her medical degree should be assessed at least as equivalent to a Master's degree is not supported by the evidence on file at the time of assessment. There was no evidence that Bachelor's degree was required for entry into the program. There was no evidence that the Applicant's degree was awarded from a faculty of graduate studies. There was no evidence of any graduate level courses or specializations obtained after the Applicant received her medical degree.
>
> In support of her claim, the Applicant submitted a translated statement from the Superintendent of Academic Management & Post-Graduate Studies at Hormozgan University stating that a medical degree is "evaluated at least equal to a Master's Degree."
>
> Based on my knowledge of the educational credentials in Iran and my experience as a visa officer, a statement of equivalency without satisfactory supporting evidence is not sufficient evidence of a Master's degree. The statement provides no basis for its conclusion that a medical degree is equivalent to a Master's degree (Lacasse Affidavit at paras 6-9).

[25] The affidavit is a double-edged sword. While it purports to address breach of procedural fairness, an outrageously inaccurate suggestion, it also underscores what is wrong with the decision. It shows, in some small way, what the Officer should have done.

[26] The Respondent's attempt to introduce this evidence was improper. The case law of this Court is replete with decisions admonishing parties for attempting to augment the "Record". Justice Zinn's comment in *Huang v Canada (Minister of Citizenship and Immigration)*, 2009 FC 135, 175 ACWS (3d) 846, is but one example.

> 18 As noted, the respondent put in evidence an affidavit sworn December 15, 2008 by the visa officer whose decision is under review. I concur with the observations of Justice Gauthier in *Jesurobo v. Canada (Minister of Citizenship & Immigration)*, [2007] F.C.J. No. 1680 (F.C.), at paragraph 12, that the respondent cannot rely on new evidence from the officer to change, explain or add to the refusal letter and the CAIPS notes. It is an attempt by the officer to pull himself up by his bootstraps where his CAIPS notes may be deficient or too summary in nature. […]

[27] There is an instance where the Respondent and its counsel knew or ought to have known that affidavits of this type are not only inadmissible but undermine the very process of judicial review. It was an attempt to sway the Court on the merits of the decision.

[28] Not only is the affidavit not admitted, this is the type of case which justifies a cost award. The case law confirms that where there are special reasons, costs may be awarded. Special reasons would include, but in no way be limited to, situations where a party acted in an unfair, oppressive or improper manner or acted in bad faith.

[29] The Respondent's behaviour on this issue was so improper, so disingenuous that costs of $1,000 will be awarded. The Applicant requested more but the costs of dealing with this issue is better reflected in the $1,000 award. It is hoped that such tactics will not be repeated.

IV. CONCLUSION

[30] For all these reasons, this judicial review will be granted, the decision quashed and the matter referred immediately to a new officer for a new determination.

[31] There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the decision is quashed and the matter is to be referred immediately to a new officer for a new determination. Costs in the amount of $1,000 is to be paid by the Respondent forthwith.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-5636-12

STYLE OF CAUSE: ARMAGHAN ESHRAGHIAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JULY 4, 2013

REASONS FOR JUDGMENT AND JUDGMENT: PHELAN J.

DATED: JULY 29, 2013

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