

Date: 20080521

Docket: IMM-3841-07

Citation: 2008 FC 627

Ottawa, Ontario, May 21, 2008

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

SONIA ROSARIO ARTICA VILA

Applicant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA or the Act) for judicial review of a decision of a visa officer (the officer) at the Canadian Embassy in Lima, Peru dated April 21, 2007, wherein the officer found that Sonia Rosario Artica Vila (the applicant) did not meet the requirements for a work permit.

[2] The applicant requested that the application for judicial review be granted, that the decision of the officer be set aside and that the matter be remitted for reconsideration before a different officer.

Background

[3] In July 2007, the applicant applied for a work authorization as a live-in caregiver. As requested, she attended an interview at the Canadian Embassy in Lima, Peru on August 8, 2007. There is some dispute between the parties as to what happened during the interview. The applicant alleged that the officer spoke quickly, did not give her enough time to answer the questions, and quickly ended the interview. At the end of the interview, the officer informed the applicant that her application had been rejected. This was also communicated in a letter dated August 21, 2007. This is the judicial review of the officer's decision.

Officer's Decision

[4] The officer refused the application on the basis that the applicant did not meet the necessary language requirements as described in subsection 112(d) of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the Regulations). The officer's Computer Assisted Immigration Processing System (CAIPS) notes provide more insight into this finding:

Language: Applicant does not speak English. She has learned how to say her name and certain words such as milk, food, baby. However she can not follow a conversation or undersatnd [*sic*] simple questions.

Issues

[5] The applicant submitted the following issue for consideration:

Did the officer err in law by reaching the conclusion that the applicant was unable to speak, read and listen to English or French at a level sufficient to communicate effectively in an unsupervised situation?

[6] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the officer breach procedural fairness in failing to expressly mention documentation on the record indicating that the applicant had completed English language training?
3. Did the officer breach procedural fairness in failing to test the applicant's English reading and writing abilities?
4. Did the officer breach procedural fairness in failing to respect the duty to ensure proper testing conditions?

Applicant's Submissions

[7] The applicant submitted that the appropriate standard of review for the officer's decision is reasonableness (*Ram v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 855; *Jhattu v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1058). The applicant submitted that the officer breached procedural fairness in failing to ensure proper testing conditions

(*Giacca v. Canada (Minister of Citizenship and Immigration)* (2000), 200 F.T.R. 107). It was submitted that there is no indication from the CAIPS notes that the officer ensured proper testing conditions such as speaking slowly and providing sufficient time to answer questions. It was submitted that the Court has recognized that testing is a stressful situation for persons examined, especially when job prospects or immigration status are determined by the outcome of the language test (*Giacca*, above). It was further submitted that the officer breached procedural fairness in failing to evaluate the applicant's English reading and writing abilities. And finally, the applicant submitted that the officer breached procedural fairness in failing to consider evidence submitted as to the applicant's English language training from CICEX – Special English Language Institute. It was submitted that the officer had a duty to properly examine and verify the evidence and failed to do so (*Mascarenas v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 737).

Respondent's Submissions

[8] The respondent submitted that the officer's decision is discretionary and as such it attracts a high degree of deference. It was submitted that the appropriate standard of review is patent unreasonableness (*Mercado v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1527; *Bellido v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 452; *Hua v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1647). The respondent noted that subsection 112(d) requires that the applicant have the ability to speak, read and listen in English and as such, there was no requirement on the officer to test the applicant's reading and writing abilities once it was determined that her speaking abilities were insufficient.

Analysis and Decision

[9] **Issue 1**

What is the appropriate standard of review?

The applicant submitted that the appropriate standard of review is reasonableness because the question is one of mixed law and fact. The respondent submitted that the appropriate standard of review is one of patent unreasonableness because the question is purely factual. I disagree with both submissions. In my opinion, the applicant has not challenged the officer's overall finding to deny the application, but yet has challenged the finding that the applicant did not meet the linguistic requirements of the Regulations. The basis of the challenge to this finding is three questions of procedural fairness. Questions of procedural fairness are reviewable on a standard of correctness (*Hassani v. Canada (Minister of Citizenship and Immigration)*, [2007] 3 F.C.R. 501).

[10] **Issue 2**

Did the officer breach procedural fairness in failing to expressly mention documentation on the record indicating that the applicant had completed English language training?

The applicant submitted that the officer erred in failing to consider documentation supporting the applicant's language training from CICEX- Special English Language Institute. It was submitted that the CAIPS notes do not indicate that the officer considered this evidence and as such, the officer breached procedural fairness. In *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 at paragraph 17, the Court stated the

following about the duty on a decision maker to consider and refer to evidence in rendering their decision:

[...] In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[11] In my opinion, given that the officer found that the applicant's spoken English was insufficient, the officer was under a duty to consider and expressly refer to this documentation. Failure to do so leaves the applicant wondering whether it was considered at all and how it factored into the officer's analysis. I am satisfied that the officer breached procedural fairness in this regard. I would allow the judicial review on this ground.

[12] The applicant has submitted an affidavit swearing to the conditions alleged. The visa officer filed an affidavit in which no mention was made of the applicant's assertions concerning the conduct of the interview. The CAIPS notes are also silent on this point.

[13] As I have no reason to disbelieve the applicant's statements, I must conclude that the officer breached the duty of procedural fairness in failing to respect the duty to ensure proper testing conditions.

[14] I need not deal with the other issue raised by the applicant.

[15] The application for judicial review is therefore allowed and the matter is remitted for reconsideration before a different officer.

[16] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[17] **IT IS ORDERED that** the application for judicial review is allowed and the matter is remitted for reconsideration before a different officer.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Regulations*, S.C. 2001, c. 27:

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 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.

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 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.

Immigration Manual OP 14 : *Processing Applicants for the Live-in Caregiver Program:*

5.6 Language Ability

Live-in caregivers must have a level of fluency in English or French that enables them to function independently in an unsupervised setting and to protect the persons in their care. They must be able to:

- respond to emergency situations by contacting a doctor, ambulance, police or fire department;
- answer the telephone and the door;
- read the labels on medication; and
- may be required to communicate with others outside the home, such as schools, stores, or other institutions.

A proficiency in speaking, understanding and reading will also ensure that caregivers understand their rights and obligations and are not dependent on their employers to interpret provincial labour legislation and employment standards. They will also be better equipped to seek outside assistance in the event of personal difficulties or if they find themselves in an abusive employment situation.

5.6 Connaissance de la langue

L'aide familial résidant doit parler l'anglais ou le français pour pouvoir évoluer de façon autonome dans une situation non supervisée et protéger les personnes qui lui sont confiées. Il doit être en mesure de :

- faire face aux situations d'urgence, par exemple appeler un médecin, l'ambulance, la police ou les pompiers;
- répondre au téléphone et aller voir qui est à la porte;
- lire l'étiquette d'un médicament; et
- communiquer avec d'autres personnes hors du foyer, notamment à l'école, au magasin ou dans d'autres établissements.

De plus, un aide familial résidant qui parle, comprend et lit bien la langue comprendra ses droits et ses obligations et ne dépendra pas de son employeur pour l'interprétation de la législation du travail et des normes d'emploi provinciales. En outre, il sera mieux armé pour demander de l'aide à l'extérieur en cas de difficulté personnelle ou de violence dans sa situation d'emploi.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3841-07

STYLE OF CAUSE: SONIA ROSARIO ARTICA VILA
- and -
THE MINISTER OF CITIZENSHIP
& IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 13, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: May 21, 2008

APPEARANCES:

Mariana Brankovic

FOR THE APPLICANT

John Loncar

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Niren and Associates
Toronto, Ontario

FOR THE APPLICANT

John H. Sims, Q.C.
Deputy Attorney General of Canada

FOR THE RESPONDENT