Federal Court  Cour fédérale

Date: 20111101

Docket: IMM-6206-10

Citation: 2011 FC 1246

Ottawa, Ontario, November 11, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

RAJWINDER MEHMI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Consul, Immigration (Consul) of the Canadian Consulate General, Chandigarh, India, dated 22 September 2010 (Decision), which refused the Applicant's application for a work permit under section 112 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations).

BACKGROUND

[2] The Applicant is a citizen of India. On 20 November 2006 she signed a "Live-in Caregiver Contract" with her employer, Rita Mehmi, who lives in Brampton, Ontario. She was to care for a two-year-old child and would be responsible for supervising, bathing, dressing, and feeding the child as well as planning, preparing, and serving meals. In 2006, Service Canada provided a Labour Market Opinion (LMO) on the contract. Having been provided with the LMO, the Applicant applied to the Consulate in Chandigarh for a work permit under the Live-in Caregiver Program (LCP). The consulate received her application (Application) on 22 January 2007.

[3] On 22 September 2010, the Consul interviewed the Applicant to assess her proficiency in English pursuant to subsection 112(d) of the Regulations. That subsection requires live-in caregivers to have "the ability to speak, read, and listen to English or French at a level sufficient to communicate effectively in an unsupervised setting" in order to be granted a work permit. The Consul informed the Applicant that the interview was to assess her qualifications.

[4] During the interview, the Consul asked several questions, some of which were related to the care of children, some to the Applicant's personal situation, and some to her education and language training. The Applicant was able to answer some questions but not others and sometimes gave answers that were not relevant to the questions asked. The Consul ended the interview when it became apparent to him that the Applicant could not understand the questions put to her.

[5] Also on 22 September 2010, the Consul reviewed the Application in light of the Interview and the documents the Applicant had provided, including a report of her grades from Guru Nanak

Dev University. He decided that the Applicant did not fulfill the requirements of subsection 112(d) and denied the Application. She was notified of the Decision by a letter dated 22 September 2010.

DECISION UNDER REVIEW

[6] The Decision under review in this application consists of the letter provided to the Applicant and the Consul's CAIPS notes.

[7] The Consul was not satisfied that the Applicant was sufficiently proficient in English to carry out the duties of the position. He noted that the Applicant had scored 35/100 in her studies in English at Guru Nanak Dev University and that she said she had studied English for three months and was still taking lessons. He also found that the Applicant's speaking ability at the Interview was poor. The Consul denied the Application because he was not satisfied that the Applicant could "care for small children in [an] unsupervised environment and ensure their safety" as required under subsection 112(d) of the Regulations.

ISSUES

[8] The Applicant raises the following issues in this application:

a. Whether her right to procedural fairness was breached by the Consul's use of an interview to assess her language skills;

b. Whether the Consul's determination that she was not sufficiently proficient in English was reasonable

STATUTORY PROVISIONS

[9] The following provision of the Act is applicable in these proceedings:

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11.** (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

[10] The following provisions of the Regulations are also applicable in these proceedings:

Live-in caregiver class	**Catégorie des aides familiaux**
110. The live-in caregiver class is prescribed as a class of foreign nationals who may become permanent residents on the basis of the requirements of this Division.	**110.** La catégorie des aides familiaux est une catégorie réglementaire d'étrangers qui peuvent devenir résidents permanents, sur le fondement des exigences prévues à la présente section.
Processing	**Traitement**
111. A foreign national who seeks to enter Canada as a live-in caregiver must make an application for a work permit in accordance with Part 11 and apply for a temporary resident visa if such a visa is required by Part 9.	**111.** L'étranger qui cherche à entrer au Canada à titre d'aide familial fait une demande de permis de travail conformément à la partie 11, ainsi qu'une demande de visa de résident temporaire si ce visa est requis par la partie 9.
Work permits – requirements	**Permis de travail: Exigences**
112. A work permit shall not be issued to a foreign national	**112.** Le permis de travail ne peut être délivré à l'étranger

who seeks to enter Canada as a live-in caregiver unless they	qui cherche à entrer au Canada au titre de la catégorie des aides familiaux que si l'étranger se conforme aux exigences suivantes:
(*d*) have the ability to speak, read and listen to English or French at a level sufficient to communicate effectively in an unsupervised setting;	*d*) il peut parler, lire et écouter l'anglais ou le français suffisamment pour communiquer de façon efficace dans une situation non supervisée;

STANDARD OF REVIEW

[11] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2009] SCJ No. 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[12] In *de Luna v Canada (Minister of Citizenship and Immigration)* 2010 FC 726, [2010] FCJ No. 882, Justice Leonard Mandamin considered whether the applicant's right to procedural fairness was breached by the use of a Speaking Proficiency in English Assessment Knowledge (SPEAK) test rather than an interview to assess her language abilities. He concluded that it was not. In *Vila v Canada (Minister of Citizenship and Immigration* 2008 FC 627, [2008] FCJ No. 823, Justice John O'Keefe found that an applicant's right to procedural fairness was breached when the officer evaluating her application under the LCP failed to consider written documentation on the applicant's English proficiency. Further, in *Giacca v Canada (Minister of Citizenship and*

Immigration), [2001] FCJ No. 186, 200 FTR 107, Justice Sandra Simpson found that there was a breach of natural justice when the speakers in a language testing booth malfunctioned during an interview to assess the applicant's language abilities. These cases show that the method of evaluating applicants language abilities is an issue of procedural fairness (see also *Kumar v Canada (Minister of Citizenship and Immigration)* 2011 FC 770, [2011] FCJ No. 970 and *Hassani v Canada (Minister of Citizenship and Immigration)* 2006 FC 1283, [2006] FCJ No. 1597 at paragraphs 28 and 34.) Questions of procedural fairness are evaluated on the standard of correctness (*Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12, [2009] 1 SCR 339). The standard of review with respect to the first issue in this case is correctness.

[13] In *Dunsmuir*, above, the Supreme Court of Canada held at paragraph 50:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[14] With respect to the second issue, in *Kumar*, above, Justice David Near found that an officer's decision on the language skills of an applicant for permanent residence as a skilled worker was reasonableness. Using the pre-*Dunsmuir* pragmatic and functional approach, Justice Max Teitelbaum found in *Al-Kassous v Canada (Minister of Citizenship and Immigration)* 2007 FC 541, [2007] FCJ No. 731 that the standard of review applicable to an officer's assessment of an applicant's language skills was reasonableness *simpliciter*. Further, in *Jhattu v Canada (Minister of Citizenship and Immigration)* 2005 FC 853, [2005] FCJ No. 1058, Justice O'Keefe found that the standard of review with respect to an officer's decision on a work-permit application was

reasonableness *simpliciter*. The Applicant in this case challenges the Consul's assessment of her language skills, so the standard of review with respect to the second issue is reasonableness.

[15] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Khosa*, above, at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicant

The Officer Breached the Applicant's Right to Procedural Fairness

[16] The Applicant argues that the Consul breached her right to procedural fairness by relying only on an interview to assess her language skills. This breached her right to procedural fairness because oral interviews are subjective, unscientific, and unreliable. Since an oral interview is unreliable, it is a breach of procedural fairness *per se*.

[17] The Applicant notes that CIC's OP-6 *Federal Skilled Workers* manual for applications under the Federal Skilled Workers Program directs that officers should use objective measures to test language abilities. Although the OP-14 *Processing Applicants for the Live-in Caregiver Program* manual directs that officers should use an interview to assess language skills when they are unsure about an applicant's ability, the Applicant says that she should have been able to participate in a

standardized language test, such as the SPEAK test. The Applicant also notes that office specific guidelines for the Canadian Embassy in Manila direct that applicants under the LCP should take the IELTS, a standardized English test. The Applicant was denied procedural fairness because she was not given the chance to take a standardized test.

[18] As noted above, Justice Mandamin held in *de Luna* that the applicant in that case was not denied procedural fairness because she had been able to take a SPEAK test. The Applicant says this means that her right to procedural fairness was breached because she only had an oral interview and not a standardized test.

The Consul's Decision was Unreasonable

[19] The Applicant also argues that the Consul's decision that she did not have the required language skills was unreasonable because it was based on irrelevant evidence and a standard that was too high. She says that the standard applied in the language evaluation should be calibrated by the purpose of section 112 of the Regulations. The purpose of that section is to ensure that live-in caregivers have the skills required to care for people in Canada. Since the Applicant will be caring for children, the assessment of her language skills should have been carried out with the activities involved in caring for children in mind. When the Consul assessed her language ability on the basis of irrelevant questions, such as her marital status, where she learned to speak English, and where she was living at the time, he committed an error.

[20] The Applicant says that her language ability should have been assessed as more than sufficient because she correctly answered ten of the eleven questions that were related to childcare. The questions she was unable to answer correctly were unrelated to her ability to care for children,

so they should not have entered the Consul's assessment. By requiring the Applicant to answer unrelated questions correctly, the Consul set a standard that was too high. The Decision should be set aside as unreasonable because the assessment of the Applicant's language ability was on a standard that was too high in relation to the purpose behind section 112.

The Respondent

There was no Breach of the Applicant's Right to Procedural Fairness

[21] The Respondent says that the Applicant's right to procedural fairness was not breached by the Consul's reliance on an oral interview. The OP-6 *Federal Skilled Worker* manual is not applicable to applications under the LCP. Although a standardized test is an appropriate way to assess language ability for the Federal Skilled Worker Program, this does not mean it is an appropriate way to assess language ability under the LCP.

[22] The Respondent notes that the OP-14 *Processing Applicants for the Live-in Caregiver Program* manual clearly says that there should be an interview to assess language abilities where needed. Where the Minister has chosen the means of assessment – in the case of the LCP, an interview when needed – the Court should not interfere with that choice.

[23] According to the Respondent, *de Luna*, above, stands only for the proposition that the SPEAK test is one way of ensuring procedural fairness in the assessment of language proficiency. In that case, the issue was whether the applicant had an opportunity to respond to the decision-maker's concerns about her language ability. Justice Mandamin held that the SPEAK test gave her that opportunity. In this case, the Applicant was present in the interview room with the Consul and had the chance to address any concerns he might have had. She had the opportunity to suggest an

alternate testing method at that time, but did not take it. Further, the oral interview fairly assessed her English proficiency. The Decision should stand because there was no breach of procedural fairness.

The Conclusion That the Applicant was Not Sufficiently Proficient was Reasonable

[24] The Consul's conclusion that the Applicant did not meet the requirement of subsection 112(d) was reasonable, even though she disagrees with it. This conclusion is one of fact and deserves deference. The Applicant gave a number of incorrect responses to the Consul's questions in the Interview and it was reasonable for him to conclude as he did based on those responses.

[25] Since the decision was reasonable and there was no breach of procedural fairness, the Consul's Decision should stand.

ANALYSIS

[26] There is no evidence before the Court that the Consul's assessment of the Applicant's proficiency was either inaccurate or arrived at unfairly. The Applicant's position is that the Consul's failure to invite or require the Applicant to take a standardized test was, *per se*, unfair. She points to the practices adopted in Manila, and the uses made there of the SPEAK test.

[27] It seems to me that, in some situations, a standardized test may well be required in order to ensure procedural fairness, but I cannot say that this will always be the case. The Applicant has provided no evidence that a standardized test is required to ascertain language proficiency in all instances and/or that it is any better as a measuring tool than a face-to-face oral interview. It is difficult for the Court to assess whether it would have made any difference in this case because the

Applicant has provided no evidence that the Consul's assessment was inaccurate or that she was not given a fair opportunity to demonstrate her language skills. She merely wants the Court to decide in an abstract way that procedural unfairness occurred because the Consul relied upon her own interview to assess the Applicant's proficiency in English.

[28] The onus was on the Applicant to provide whatever information she thought was necessary to convince the Consul that she qualified under the live-in-caregiver program. See *Arumugam v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No. 445 at paragraph 29; *Ling v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 1030 at paragraph 5; and *Hajariwala v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 79, [1998] FCJ No 1021. The Consul felt he could not proceed with the interview "without providing possible answers with in the question itself" because the Applicant's English was so poor.

[29] There is simply nothing before the Court to suggest that, on the facts of this case, the Applicant was not given a fair and full opportunity to demonstrate the level of her proficiency in English or that the Consul got it wrong. Presumably, if the Applicant felt she had not been given a fair opportunity, she would have provided evidence to that effect to the Court.

[30] There is no statutory or case-law authority to my knowledge which says that procedural fairness requires, in every case, a standardized language test. In some instances, it would be pointless. OP-14 directs in these situations that "If an officer has reason to doubt an applicant's language ability, then the officer should interview the applicant." This appears to recognize that a face-to-face interview is an acceptable procedure in these circumstances. I do not say that it will suffice in all circumstances. A standardized test may be the only fair way of assessing the ability of some applicants. Much will depend upon the circumstances of each case and whether the interview

has provided a particular applicant with a fair opportunity to demonstrate their proficiency and the officers ability to make an assessment from what transpires at the interview. I have no evidence of procedural unfairness on the facts of this case. The Consul felt that the language problem was so bad that she could not conduct a meaningful interview. The Applicant does not say that the Officer was wrong in this regard.

[31] On the Applicant's second point, it is clear to me that the Consul does conduct a purposive interview and analysis. As his conclusions make clear, he focused on ascertaining whether the Applicant would be able to care for small children in an unsupervised environment and ensure their safety. He asked general questions to test the Applicant's general ability to communicate in English, as well as more specific questions about caring for children. As OP-14 makes clear, applicants must be able to do more than deal with the internal situation. They must also be able to:

- Respond to emergency situations by contacting a doctor, ambulance, police or fire department;
- Read the labels on medication;
- Answer the telephone and the door; and
- Communicate with others outside the home, such as schools, stores or other institutions.

[32] The Applicant may disagree with the Consul's assessment, but there is nothing before the Court to suggest it is either unreasonable or incorrect. The Court cannot re-weigh evidence and must allow officers to exercise the discretion that Parliament has allocated to them. See *Suresh v Canada*

(Minister of Citizenship and Immigration) 2002 SCC 1, [2002] SCJ No. 3 at paragraphs 29, 34, and 37 and *Aoanan v Canada (Minister of Citizenship and Immigration)* 2009 FC 734 at paragraph 42.

[33] Counsel agree that there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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