

Federal Court



Cour fédérale

**Date: 20100615**

**Docket: IMM-5010-09**

**Citation: 2010 FC 649**

**Ottawa, Ontario, June 15, 2010**

**PRESENT: The Honourable Mr. Justice O'Keefe**

**BETWEEN:**

**MAHGOL POURGOMARI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of a decision of an immigration officer (the officer) at the Canadian Embassy in Warsaw, Poland, dated July 10, 2009, refusing the applicant's application for permanent residence on the basis that the applicant did not meet the requirements of the federal skilled worker class.

[2] The applicant seeks an order from this Court quashing the decision of the officer and remitting the matter back for reconsideration by a different officer with such directions as this Honourable Court considers appropriate.

### **Background**

[3] The applicant is a citizen of Iran. She applied for permanent residence in Canada under the federal skilled worker class in 2004 as a writer. Her husband and three children were included in the application. In June 2004, the Canadian Embassy in Syria acknowledged receipt of her application.

[4] In November of 2008, the applicant was asked to provide and did provide additional documentation for the purpose of processing the application.

[5] On July 10, 2009, the applicant was informed that her application had been transferred to the Canadian Embassy in Poland for assessment and that her application had been assessed and refused. She was awarded 65 points, two short of the required minimum of 67. Of importance in this case were the points awarded by the officer for official language proficiency. The officer awarded the applicant four points for English proficiency based on her IELTS test results, but no points for French, stating in his reasons that she had not demonstrated any proficiency in French.

[6] The applicant indicated in her application that she had a basic level of French language proficiency. To support this, she submitted a certificate from the Iran Language Institute certifying

that she had completed a French language course and had obtained a grade of 76 out of 100. The officer did not acknowledge this and instead recorded in the CAIPS notes that there was no evidence of French proficiency on file.

### **Issues**

[7] The issues are as follows:

1. What is the standard of review?
2. Did the officer err with regard to the applicant's French proficiency?
3. Did the officer make a reviewable error with respect to substituted evaluation?
4. Were the officer's reasons adequate?
5. Did the officer make a reviewable error with respect to the applicant's English language proficiency?

### **Applicant's Written Submissions**

[8] The CAIPS notes indicating that there was "no evidence" of French competency on file is unreasonable. The applicant had submitted evidence of French language study. Officers have a duty to assess language proficiency on the documents which are submitted. Given that her failure to accumulate two points for French language proficiency resulted in her application being refused, the officer was required to provide reasons for not awarding any points under this category. If the officer thought the certificate from the Iran Language Institute was insufficient in demonstrating

French language proficiency, an explanation was required. The officer had a duty to inform the applicant of the concern and afford the applicant an opportunity to take a language exam from a designated institution or to provide further written evidence.

[9] The applicant submits that the officer erred in only awarding her four points for English proficiency. The decision was based solely on her IELTS score without any regard for the other evidence of the applicant's skill in English.

[10] The applicant also submits that it was a further error for the officer not to provide reasons as to why the points awarded demonstrated that the applicant would not become economically established in Canada. The officer was required to provide reasons as to why he or she did not substitute an evaluation under subsection 76(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

### **Respondent's Written Submissions**

[11] The officer did not err in the calculation of points awarded to the applicant for French language proficiency. The applicant did not provide required documents or prove any proficiency in French. There is no evidence that the officer ignored the evidence that a language course was taken. However, that certificate does not meet the stipulation of either paragraph 79(1)(a) or (b) of the Regulations. Therefore, his assessment was plainly correct.

[12] There is no duty on immigration officers to pursue the language matter further and inform an applicant of a deficiency in the application as the applicant suggests. Nor is an immigration officer required to bring to an applicant's attention adverse conclusions that the officer may draw from evidence submitted.

[13] The reasons were sufficiently clear to allow the applicant to understand why her application was refused. Further, the CAIPS notes informed the applicant that all of the evidence was considered and the point grid used in the refusal letter constitutes evidence of the officer's evaluation of the evidence.

[14] Finally, the officer has a limited duty to explain or justify why a favourable consideration was not given in a substituted evaluation. Discretion under subsection 76(3) is exceptional.

### **Analysis and Decision**

[15] **Issue 1**

What is the standard of review?

Questions of fact or discretion as well as questions where the legal issues cannot be easily separated from the factual issues generally attract the standard of reasonableness. Decisions of immigration officers about whether to grant a permanent resident visa are discretionary decisions based essentially on the facts of each particular application. Therefore, the reasonableness standard applies (see *Wai v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 780, [2009] F.C.J.

No. 1015 at paragraph 18, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9 (QL)).

[16] The applicant has also raised certain issues of procedural fairness for which the standard of review is correctness (see *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1).

[17] I wish to deal first with Issue 4.

[18] **Issue 4**

Were the officer's reasons adequate?

With regard to the adequacy of reasons, the law is settled. The duty of fairness only requires that visa officers provide the most basic or minimal reasons for their conclusions and determinations (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, [1999] S.C.J. No. 39 (QL)). It is also settled that an alleged inadequacy of reasons must be severe enough to occasion prejudice on the applicant's right to judicial review (see *Za'rour v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1281, [2007] F.C.J. No. 1647 at paragraphs 19 and 20).

[19] While visa officers are not required to provide reasons with any degree of detail or length, the reasons given by the officer for assessing zero points for French proficiency were clearly

deficient and ultimately prejudiced the applicant's right to judicial review. The letter of rejection simply stated:

In your application you stated that you demonstrated a basic proficiency in French. However, upon review of the information on your file, I concluded that you demonstrated no proficiency in French and was therefore unable to award you any points under this factor.

[20] The CAIPS notes provide no further insight as they read in relevant part:

FRENCH: 0 – STATED BASIC, BUT NO EVIDENCE ON FILE.

[21] Provided with these reasons, the applicant had no way of knowing whether the certificate that she submitted had been received or any indication of why it was rejected. A very short statement could have potentially addressed the situation. If the officer concluded that the certificate simply did not provide sufficient or reliable evidence of any proficiency, the officer needed to only state that and no more. However, because this was not done, the duty of fairness was breached.

[22] As a result, the application for judicial review must be allowed and the matter referred to a different officer for redetermination.

[23] Because of my finding on this issue, I need not deal with the remaining issues.

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

**JUDGMENT**

[25] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different officer for redetermination.

“John A. O’Keefe”

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Judge



## ANNEX

**Relevant Statutory Provisions***Immigration and Refugee Protection Regulations, SOR/2002-227*

76.(1) For the purpose of determining whether a skilled worker, as a member of the federal skilled worker class, will be able to become economically established in Canada, they must be assessed on the basis of the following criteria:	76.(1) Les critères ci-après indiquent que le travailleur qualifié peut réussir son établissement économique au Canada à titre de membre de la catégorie des travailleurs qualifiés (fédéral) :
(a) the skilled worker must be awarded not less than the minimum number of required points referred to in subsection (2) on the basis of the following factors, namely,	a) le travailleur qualifié accumule le nombre minimum de points visé au paragraphe (2), au titre des facteurs suivants :
(i) education, in accordance with section 78,	(i) les études, aux termes de l'article 78,
(ii) proficiency in the official languages of Canada, in accordance with section 79,	(ii) la compétence dans les langues officielles du Canada, aux termes de l'article 79,
(iii) experience, in accordance with section 80,	(iii) l'expérience, aux termes de l'article 80,
(iv) age, in accordance with section 81,	(iv) l'âge, aux termes de l'article 81,
(v) arranged employment, in accordance with section 82, and	(v) l'exercice d'un emploi réservé, aux termes de l'article 82,
(vi) adaptability, in accordance with section 83; and	(vi) la capacité d'adaptation, aux termes de l'article 83;
(b) the skilled worker must	b) le travailleur qualifié :

(i) have in the form of transferable and available funds, unencumbered by debts or other obligations, an amount equal to half the minimum necessary income applicable in respect of the group of persons consisting of the skilled worker and their family members, or

(i) soit dispose de fonds transférables — non grevés de dettes ou d'autres obligations financières — d'un montant égal à la moitié du revenu vital minimum qui lui permettrait de subvenir à ses propres besoins et à ceux des membres de sa famille,

(ii) be awarded the number of points referred to in subsection 82(2) for arranged employment in Canada within the meaning of subsection 82(1).

(ii) soit s'est vu attribuer le nombre de points prévu au paragraphe 82(2) pour un emploi réservé au Canada au sens du paragraphe 82(1).

(2) The Minister shall fix and make available to the public the minimum number of points required of a skilled worker, on the basis of

(2) Le ministre établit le nombre minimum de points que doit obtenir le travailleur qualifié en se fondant sur les éléments ci-après et en informe le public :

(a) the number of applications by skilled workers as members of the federal skilled worker class currently being processed;

a) le nombre de demandes, au titre de la catégorie des travailleurs qualifiés (fédéral), déjà en cours de traitement;

(b) the number of skilled workers projected to become permanent residents according to the report to Parliament referred to in section 94 of the Act; and

b) le nombre de travailleurs qualifiés qui devraient devenir résidents permanents selon le rapport présenté au Parlement conformément à l'article 94 de la Loi;

(c) the potential, taking into account economic and other relevant factors, for the establishment of skilled workers in Canada.

c) les perspectives d'établissement des travailleurs qualifiés au Canada, compte tenu des facteurs économiques et autres facteurs pertinents.

(3) Whether or not the skilled worker has been awarded the minimum number of required points referred to in subsection

(3) Si le nombre de points obtenu par un travailleur qualifié — que celui-ci obtienne ou non le nombre minimum de

(2), an officer may substitute for the criteria set out in paragraph (1)(a) their evaluation of the likelihood of the ability of the skilled worker to become economically established in Canada if the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada.

...

79.(1) A skilled worker must specify in their application for a permanent resident visa which of English or French is to be considered their first official language in Canada and which is to be considered their second official language in Canada and must

(a) have their proficiency in those languages assessed by an organization or institution designated under subsection (3); or

(b) provide other evidence in writing of their proficiency in those languages.

(2) Assessment points for proficiency in the official languages of Canada shall be awarded up to a maximum of 24 points based on the benchmarks referred to in Canadian Language Benchmarks 2000 for the English language and Niveaux

points visé au paragraphe (2) — ne reflète pas l'aptitude de ce travailleur qualifié à réussir son établissement économique au Canada, l'agent peut substituer son appréciation aux critères prévus à l'alinéa (1)a).

...

79.(1) Le travailleur qualifié indique dans sa demande de visa de résident permanent la langue — français ou anglais — qui doit être considérée comme sa première langue officielle au Canada et celle qui doit être considérée comme sa deuxième langue officielle au Canada et :

a) soit fait évaluer ses compétences dans ces langues par une institution ou organisation désignée aux termes du paragraphe (3);

b) soit fournit une autre preuve écrite de sa compétence dans ces langues.

(2) Le maximum de points d'appréciation attribués pour la compétence du travailleur qualifié dans les langues officielles du Canada est de 24, calculés d'après les standards prévus dans les Niveaux de compétence linguistique canadiens 2006, pour le

de compétence linguistique canadiens 2006 for the French language, as follows:

(a) for the ability to speak, listen, read or write with high proficiency

(i) in the first official language, 4 points for each of those abilities if the skilled worker's proficiency corresponds to a benchmark of 8 or higher, and

(ii) in the second official language, 2 points for each of those abilities if the skilled worker's proficiency corresponds to a benchmark of 8 or higher;

(b) for the ability to speak, listen, read or write with moderate proficiency

(i) in the first official language, 2 points for each of those abilities if the skilled worker's proficiency corresponds to a benchmark of 6 or 7, and

(ii) in the second official language, 2 points for each of those abilities if the skilled worker's proficiency corresponds to a benchmark of 6 or 7; and

(c) for the ability to speak, listen, read or write

français, et dans le Canadian Language Benchmarks 2000, pour l'anglais, et selon la grille suivante :

a) pour l'aptitude à parler, à écouter, à lire ou à écrire à un niveau de compétence élevé :

(i) dans la première langue officielle, 4 points pour chaque aptitude si les compétences du travailleur qualifié correspondent au moins à un niveau 8,

(ii) dans la seconde langue officielle, 2 points pour chaque aptitude si les compétences du travailleur qualifié correspondent au moins à un niveau 8;

b) pour les capacités à parler, à écouter, à lire ou à écrire à un niveau de compétence moyen :

(i) dans la première langue officielle, 2 points pour chaque aptitude si les compétences du travailleur qualifié correspondent aux niveaux 6 ou 7,

(ii) dans la seconde langue officielle, 2 points si les compétences du travailleur qualifié correspondent aux niveaux 6 ou 7;

c) pour l'aptitude à parler, à écouter, à lire ou à écrire chacune des langues officielles :

(i) with basic proficiency in either official language, 1 point for each of those abilities, up to a maximum of 2 points, if the skilled worker's proficiency corresponds to a benchmark of 4 or 5, and

(ii) with no proficiency in either official language, 0 points if the skilled worker's proficiency corresponds to a benchmark of 3 or lower.

(3) The Minister may designate organizations or institutions to assess language proficiency for the purposes of this section and shall, for the purpose of correlating the results of such an assessment by a particular designated organization or institution with the benchmarks referred to in subsection (2), establish the minimum test result required to be awarded for each ability and each level of proficiency in the course of an assessment of language proficiency by that organization or institution in order to meet those benchmarks.

(4) The results of an assessment of the language proficiency of a skilled worker by a designated organization or institution and the correlation of those results with the benchmarks in accordance with subsection (3) are conclusive evidence of the skilled worker's proficiency in

(i) à un niveau de compétence de base faible, 1 point par aptitude, à concurrence de 2 points, si les compétences du travailleur qualifié correspondent aux niveaux 4 ou 5,

(ii) à un niveau de compétence de base nul, 0 point si les compétences du travailleur qualifié correspondent à un niveau 3 ou à un niveau inférieur.

(3) Le ministre peut désigner les institutions ou organisations chargées d'évaluer la compétence linguistique pour l'application du présent article et, en vue d'établir des équivalences entre les résultats de l'évaluation fournis par une institution ou organisation désignée et les standards mentionnés au paragraphe (2), il fixe le résultat de test minimal qui doit être attribué pour chaque aptitude et chaque niveau de compétence lors de l'évaluation de la compétence linguistique par cette institution ou organisation pour satisfaire à ces standards.

(4) Les résultats de l'examen de langue administré par une institution ou organisation désignée et les équivalences établies en vertu du paragraphe (3) constituent une preuve concluante de la compétence du travailleur qualifié dans les langues officielles du Canada

the official languages of Canada    pour l'application des  
for the purposes of subsections    paragraphes (1) et 76(1).  
(1) and 76(1).

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-5010-09

**STYLE OF CAUSE:** MAHGOL POURGOMARI

- and -

THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

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**DATE OF HEARING:** May 25, 2010

**REASONS FOR JUDGMENT  
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**DATED:** June 15, 2010

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