

**Date: 20081222**

**Docket: IMM-116-08**

**Citation: 2008 FC 1408**

**Ottawa, Ontario, December 22, 2008**

**PRESENT: The Honourable Mr. Justice Mandamin**

**BETWEEN:**

**ARFANA ROOHI**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Arfana Roohi (the applicant) applied for judicial review pursuant to s.72 of the *Immigration and Refugee Protection Act, 2001, c. 27* (IRPA) of the decision of a Visa Officer (the Officer) at the Canadian High Commission at Islamabad, Pakistan on November 12, 2007. The Officer refused her application for permanent residence as a member of the federal skilled worker class.

[2] The Officer interviewed Ms. Roohi and decided that the points awarded did not reflect Ms. Roohi's ability to become economically established in Canada; the Officer made a negative substituted evaluation, under s. 76(3) of IRPA. A senior visa officer concurred with the Officer's evaluation.

### **BACKGROUND**

[3] Ms. Roohi is a citizen of Pakistan. She and her husband applied for permanent resident visas under the federal skilled worker category. She scored 67 points which is the minimum number of points required to qualify as a member under the skilled worker class.

[4] Ms. Roohi has two university degrees, Bachelor of Arts and Bachelor of Education. She also has a Masters Degree in Education which was not allotted points by the Officer in the assessment because she took her studies as a private student. She teaches at the Syed Public High School in Lahore, Pakistan.

[5] Ms. Roohi completed the International English Language Testing System (IELTS) and received an overall score of 4.5 based on listening, reading, writing and speaking English. This correlates to a basic proficiency in English.

[6] Ms. Roohi and her husband were interviewed by the Officer on November 12, 2006. As a result of the interview the Officer entered in the Computer Assisted Immigration Processing System notes (CAIPS):

I believe the points awarded do not accurately reflect the clients ability to successfully establish in Canada. Due to low language skills and experience I am not satisfied that she possesses the depth of experience required by a teacher as described per NOC.

Recommend negative substituted evaluation,

I am not satisfied that FN will be able to successfully establish in Canada referred to senior officer for review.

[7] The same day, a second visa officer entered his concurrence in the CAIPS notes:

Reviewed.

Given the applicant's very limited English skills, which would render her hardly employable in Canada even in an low-skilled occupation; given the very limited scope of her duties as a teacher here in Pakistan which are virtually untransferable to the Canadian labour market; given her lack of preparation for immigration to Canada; as well as given her apparent lack of readily available unencumbered funds to assist her in her initial settlement in Canada, I am satisfied that the points obtained do not reflect the applicant's true capacity to establish herself successfully in Canada.

## **THE DECISION UNDER REVIEW**

[8] The Officer wrote on November 12, 2007:

The minimum points requirement to qualify for immigration to Canada is 67. However, subsection 76(3) of the regulations permits an officer to substitute their evaluation of the likelihood to become economically established in Canada if the number of points awarded are not a sufficient indicator of whether the skilled worker may become economically established in Canada. As discussed at your interview, I am not satisfied that the points that you have been awarded are a sufficient indicator of the likelihood of your ability to become economically established in Canada. I have made this determination because of your limited English skills and I am not satisfied that you possess the depth of experience required to teach in Canada. You were given an opportunity to address these concerns at your interview. The information and the explanations you have given me have not satisfied me that you will be able to become economically established in Canada. A senior officer concurred with this evaluation.

[9] The Officer concluded in her decision letter:

Following an examination of your application, I am not satisfied that you meet the requirements of the Act and the regulations for the reasons explained above. I am therefore refusing your application.

## **ISSUES**

[10] The issues in this proceeding are:

- i. Did the Officer err in her application of the procedure in making a negative substituted evaluation?
- ii. Did the Officer err in making her negative substituted evaluation?

## **STANDARD OF REVIEW**

[11] The Officer was deciding a matter that is within the ambit of the officer's skill and experience. In *Tathgur v. Canada (MCI)*, 2007 FC 1293, I held that the standard of review for a decision of a visa officer deciding on an application for a permanent residence visa was reasonableness *simpliciter*. (also *Al-Kassous v. Canada (MCI)*, 2007 FC 541)

[12] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada held there are only two standards of review, correctness and reasonableness. Issues of discretion and mixed fact and law attract the reasonableness standard of review. *Dunsmuir* at paras. 51 and 53. The Supreme Court of Canada held that the standard of review analysis need not be conducted in every instance. Rather, where the standard of review applicable to the particular issue or matter before the court has been determined by past jurisprudence, the reviewing court may adopt that standard of review.

[13] Thus, in light of *Dunsmuir* and *Tathgur*, I conclude that the standard of review on applications for permanent residence under the skilled worker category is reasonableness and that the decision by the Officer in this case is entitled to a high degree of deference. The Court should only intervene if the decision was unreasonable.

## LAW

[14] The relevant provisions of IRPA are:

12. (2) A foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada.

12.(2) La sélection des étrangers de la catégorie « immigration économique » se fait en fonction de leur capacité à réussir leur établissement économique au Canada.

[15] The relevant provisions of *Immigration and Refugee Protection Regulations*, S.O.R. 2002 – 227,(the Regulations) are:

**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:

(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,

(i) education, in accordance with section 78,

(ii) proficiency in the official languages of Canada, in accordance with section 79,

**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) le travailleur qualifié accumule le nombre minimum de points visé au paragraphe (2), au titre des facteurs suivants :

(i) les études, aux termes de l'article 78,

(ii) la compétence dans les langues officielles du Canada, aux termes de l'article 79,

(iii) l'expérience, aux termes

(iii) experience, in accordance with section 80,

(iv) age, in accordance with section 81,

(v) arranged employment, in accordance with section 82, and

(vi) adaptability, in accordance with section 83; and

(b) the skilled worker must

(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

(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).

Circumstances for officer's substituted evaluation

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

de l'article 80,

(iv) l'âge, aux termes de l'article 81,

(v) l'exercice d'un emploi réservé, aux termes de l'article 82,

(vi) la capacité d'adaptation, aux termes de l'article 83;

b) le travailleur qualifié :

(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) 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).

Substitution de l'appréciation de l'agent à la grille

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

Concurrence

(4) An evaluation made under subsection (3) requires the concurrence of a second officer.

Confirmation

(4) Toute décision de l'agent au titre du paragraphe (3) doit être confirmée par un autre agent.

## **ANALYSIS**

*Issue 1: Did the Officer err in her application of the procedure in making a negative substituted evaluation?*

[16] Section 76(3) of the Regulations sets out the circumstances for an officer's substituted evaluation. In particular it states:

“an officer may substitute for the criteria set out in (1)(a) their evaluation of the ability of the ability of the skilled worker to become economically established in Canada...”

[17] Section 76(3) engages a two stage process for arriving at a substituted evaluation: first, the visa officer must decide if the s. 76(1) assessment is not a sufficient indicator of whether the skilled worker applicant may become economically established in Canada; second, the visa officer must evaluate the likelihood of the skilled worker becoming economically established in Canada by conducting an adequate substitute assessment on proper grounds.

[18] The applicant submits that the substituted evaluation must consider the totality of the applicant's situation to become economically established in Canada.

[19] The applicant submits that the Officer erred as she mixed the requirements under the former legislation and the new legislation. The applicant submits that under the former legislation the

applicant was required to have an intended occupation, and needed to demonstrate that they could fulfill that occupation if they were to be landed in Canada.

[20] The applicant submits that IRPA does not have this requirement, as the assessment is based on a human capital approach, and the applicant's overall skills and abilities are used to determine chances of economic establishment and success of the applicant. Under IRPA the applicant is not required to select an intended occupation.

[21] The applicant submits that the Officer erred in her assessment under IRPA as she improperly concluded that the applicant needed to demonstrate that she could teach in Canada. The applicant submits that the Officer blended the tests, which is a reviewable error.

[22] However, my review of the Officer's CAIPS notes, affidavit and examination on affidavit satisfies me the Officer had the following information before her in deciding whether the s. 76(1) assessment was a sufficient indicator of Ms. Roohi's likelihood of becoming a skilled worker in Canada:

- Ms. Roohi had the minimum acceptable score in the s. 76(1) assessment process,
- Ms. Roohi had difficulty in communicating in English,
- Ms. Roohi's experience in teaching was very limited

[30] The above suffices to give the Officer grounds to conclude that the s. 76(1) assessment was not a sufficient indication that Ms. Roohi would become economically established in Canada. I find

the Officer did not err in deciding to proceed with a substituted evaluation of the likelihood that Ms. Roohi would not become economically established as a skilled worker in Canada.

[31] It seems to me that when visa officers substitute their evaluation on the ability of a skilled worker to become economically established in Canada under s. 76(3), that substituted evaluation must be comparable to the s. 76(1) evaluation they are displacing. I say this because s. 76(1) is structured as directed to a systematic objective assessment process designed to achieve consistency in the processing of skilled worker applications. The process for substituted evaluations should not displace the underlying intent to achieve a consistent process for assessing skilled worker applications.

[32] The opening words of s. 76(3), “Whether or not the skilled worker has been awarded the minimum number of required points ...” clearly indicates that the substituted evaluation may result in a negative substituted evaluation as well as in a positive substitute evaluation. Substituted evaluations are a procedure that introduces an element of flexibility into the skilled worker application process. It allows for acceptance of applicants who may not succeed under the initial assessment where there is good reason and for screening out applicants who pass the initial assessment but ought not be accepted for valid reasons.

[33] The substituted evaluation is a decision made by a visa officer in keeping with the officer’s knowledge and expertise and is a decision under which deference is due. The officer must make a

substituted evaluation decision which is consistent with IRPA, the Regulations and the thrust of the skilled worker provisions.

[34] The Officer had before her those elements of Ms. Roohi's s. 76(1) assessment that were not questioned. These elements may be taken to be accepted and part of the substituted evaluation and would include Ms. Roohi's education and age, two factors considered in s. 76(1). Ms. Roohi did not have pre-arranged employment and this element is therefore the same in the first and second assessment. The Officer had the interview with Ms. Roohi to consider as part of her substituted evaluation exercise. The interview touched on proficiency in language and depth of Ms. Roohi's experience in teaching. The Officer also probed the extent of Ms. Roohi's planning for establishing herself economically in Canada. I conclude that the Officer's s. 76(3) substituted evaluation was comparable with a s. 76(1) assessment since her assessment was based on education, language proficiency, experience, age, and adaptability.

*Issue 2: Did the Officer err in making her negative substituted evaluation?*

[35] The revisions to the *Regulations* changed the approach in skilled worker applications from an occupation-specific approach to a broader approach which gave more emphasis to adaptability by skilled worker applicants to become economically established in Canada.

[36] In this matter, the Officer stated:

- in CAIPS notes: "Due to low language skills and experience I am not satisfied that she possesses the depth of experience required by a teacher as described in NOC. ... I am not satisfied that FN will be able to successfully establish in Canada"

- in the Decision letter: “the information and the explanations you have given me have not satisfied me that you will be able to become economically established in Canada;”
- in the Officer’s affidavit: “I asked the applicant questions to determine the nature of her teaching experience. The questions I asked were short and straightforward questions about her teaching job. It was evident to me that the applicant had difficulty understanding simple questions about matters within her knowledge . . . I proceeded to ask questions relating to personal suitability as reflected in the CAIPS notes, which confirmed my view that the applicant was not likely to be able to establish herself economically in Canada.”
- in the Officer’s examination on affidavit: “After interviewing her I felt that she was very limited in what she did, language skills, lack of preparation for going to Canada. Although personal - - I did ask her some personal suitability questions to determine, to give me an idea of how she would settle in Canada and I wasn’t satisfied.”

[37] Although the Officer referred at times to the applicant’s plan to teach in Canada, I am satisfied the Officer assessed Ms. Roohi’s ability on the broader and correct standard of the likelihood of an applicant becoming economically established in Canada.

## **CONCLUSION**

[38] I find the Officer had grounds upon which she could decide that the s. 76(1) assessment was not a sufficient indicator of Ms. Roohi’s ability to become sufficiently established in Canada. I find that she properly conducted the substituted evaluation in a manner comparable to that in s. 76(1) of the Regulations. Lastly I find the Officer had the sufficient grounds to base her negative substituted assessment. In summary, I find the Officer’s substituted evaluation to be not unreasonable.

[39] The application for judicial review is dismissed.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

1. The application for judicial review is dismissed.
2. No question of general importance is certified.

“Leonard S. Mandamin”

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Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** IMM-116-08

**STYLE OF CAUSE:** ARFANA ROOHI v. MCI

**PLACE OF HEARING:** TORONTO

**DATE OF HEARING:** OCTOBER 16, 2008

**REASONS FOR JUDGMENT  
AND JUDGMENT:** MANDMIN, J.

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