Federal Court  Cour fédérale

Date: 20090520

Docket: IMM-4054-08

Citation: 2009 FC 518

OTTAWA, Ontario, May 20, 2009

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

JOANNA CATHERINE ROBERTS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), challenges the decision of an Immigration Officer (Officer) dated July 16, 2008 refusing to issue a permanent resident visa to the Applicant, a British citizen, under the federal skilled worker class on the grounds that the Applicant did not obtain the minimum points required under the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations).

Background

[2] In February 2006 Joanna Roberts submitted an application for permanent residence to the Canadian High Commission office in London, England on the strength of her career as an Executive Assistant (National Occupation Class: 1222). She claimed that the combination of her education, language skills, work experience and age were sufficient for her to receive 67 points under the scheme set out in the Regulations, an amount which may have allowed her to become a permanent resident.

[3] Notwithstanding this claim by Ms. Roberts, the Officer who assessed her application determined that she merited only 62 points, and accordingly did not qualify under the skilled worker class. The substantive discrepancy between the Applicant's claim and the Officer's decision relates to their respective assessment of the points to be awarded for Ms. Robert's education. The Officer awarded Ms. Roberts 15 points for her education, whereas she expected to receive 20 points. The corresponding shortfall left her ineligible for permanent resident status under the skilled worker class, barring a substituted evaluation by the Officer.

[4] In the Record as well as at the hearing Ms. Roberts proposed she should receive 20 points for education on the strength of a two-year post-secondary certificate and at least 14 years of full-time or full-time equivalent study. Specifically, in Schedule 1 to her application for permanent residence she claimed to have a total of 18 years of study: 10 years of primary school, 6 years of secondary school and 2 years of college. This included a 2 year post-secondary Certificate in Medical Secretarial Studies she received from Pontypridd College in 1988, and 6 years at Rhydfelen

Comprehensive School where she received her General Certificate of Education, Ordinary Level (O Levels). Schedule 1 does not ask applicants to detail their years of primary school study.

[5] The Officer did not agree with Ms. Roberts' estimated years of education and determined she had 13 years of study, rather than the 18 proposed. On that basis the Officer awarded 15 points for education and in the CAIPS Notes explained how she assessed the Applicant's education history:

> ED: 15 pts.
>
> O Level certificate Welsh Joint Ed Committee Summer 1985 (11 yrs of study)
>
> Oct 1988 Certificate in Medical Secretarial Studies issued by Assoc of Med Secretaries, Practice Administrators and Receptionists (AMSPAR)
>
> Letter from Educ Officer of AMSPAR, Jan 2006 confirms applicant attended the college 1986-1988, completed sufficient courses/papers to be awarded the certificate (but not a diploma).
>
> Points awarded on the basis of completion of 13 years of study and receiving a post secondary qualification
>
> EXP: 21 pts
>
> Unexplained gap summer 1985 on completion of O Levels and beginning of above course 1986 (application form states she completed GCSES in 1986, but cert states 1985).
>
> […]

[6] In a July 16, 2008 letter the Officer informed Ms. Roberts that she did not meet the requirements for a permanent resident visa as a member of the skilled worker class, and refused her application.

[7] In response to the negative decision, Applicant's counsel wrote to the Officer to clarify what was, in his opinion, a calculation error. It was the Applicant's position that she should have been

credited with not less than 14 years full-time study: 2 for her AMSPAR Certificate and 12 for her O Levels, and accordingly awarded 20 points. In support of this position the Applicant included a letter from Mr. Russell Andrews, the Director of Education and Planning for Partnerships for Schools, a government agency responsible for education reform in the United Kingdom.

Mr. Andrews' letter explained that Ms. Roberts' O Level schooling should qualify as 12 years:

> If you count forward from Reception year to year 11 (end of compulsory education), you will find that the compulsory time frame comprises 12 full years. It appears that you may have missed the point about compulsory Reception year which is commonly misunderstood by people outside of the UK education system since the introduction of the National Curriculum which renamed school years from Reception to year 11.
>
> In fact, I have investigated Joanna Roberts' case and I believe she exceeded the compulsory requirement of 12 years by at least a year.

[8] The Officer did not respond to the Applicant's further submissions, and thus this application for judicial review has arisen.

Issues

[9] There are three issues raised by the Applicant:

(a) Was the Officer's assessment of the Applicant's years of education unreasonable?

(b) Did the Officer breach the duty of fairness by failing to provide the Applicant an opportunity to respond to concerns about her years of education?

(c) Did the Officer err in failing to exercise her discretion to substitute evaluation?

Legislation

[10] The regulatory framework for the skilled worker class is a combination of the IRPA and the Regulations. Section 12 of the IRPA establishes the economic class:

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.

[11] Sections 76 of the Regulations establishes the criteria a foreign national must demonstrate to be admitted to Canada under the skilled worker class:

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	(ii) la compétence dans les langues officielles du Canada,

languages of Canada, in accordance with section 79,

(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).

aux termes de l’article 79,

(iii) l’expérience, aux termes 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).

[12] Section 76(3) of the Regulations allows an immigration officer to substitute her/his own evaluation of the likelihood that an applicant may become economically self sufficient in Canada if she has not otherwise been awarded sufficient points:

76. (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.	76. (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*).

[13] Section 78(2) of the Regulations sets out the manner in which points are to be assessed with respect to a skilled worker's education:

78. (2) A maximum of 25 points shall be awarded for a skilled worker's education as follows: […]	78. (2) Un maximum de 25 points d'appréciation sont attribués pour les études du travailleur qualifié selon la grille suivante : […]
(c) 15 points for	*c*) 15 points, si, selon le cas :
(i) a one-year post-secondary educational credential, other than a university educational	(i) il a obtenu un diplôme postsecondaire — autre qu'un diplôme universitaire —

credential, and a total of at least 13 years of completed full-time or full-time equivalent studies, or	nécessitant une année d'études et a accumulé un total de treize années d'études à temps plein complètes ou l'équivalent temps plein,
(ii) a one-year university educational credential at the bachelor's level and a total of at least 13 years of completed full-time or full-time equivalent studies;	(ii) il a obtenu un diplôme universitaire de premier cycle nécessitant une année d'études et a accumulé un total d'au moins treize années d'études à temps plein complètes ou l'équivalent temps plein;
(d) 20 points for	*d*) 20 points, si, selon le cas :
(i) a two-year post-secondary educational credential, other than a university educational credential, and a total of at least 14 years of completed full-time or full-time equivalent studies, or	(i) il a obtenu un diplôme postsecondaire — autre qu'un diplôme universitaire — nécessitant deux années d'études et a accumulé un total de quatorze années d'études à temps plein complètes ou l'équivalent temps plein,
(ii) a two-year university educational credential at the bachelor's level and a total of at least 14 years of completed full-time or full-time equivalent studies;	(ii) il a obtenu un diplôme universitaire de premier cycle nécessitant deux années d'études et a accumulé un total d'au moins quatorze années d'études à temps plein complètes ou l'équivalent temps plein;

[14] Currently, an applicant needs 67 points to qualify for permanent resident status in the skilled worker class.

Analysis

[15] The assessment of an application for permanent residence under the federal skilled worker class is an exercise of a visa officer's discretion, and accordingly attracts a standard of reasonableness: *Persaud v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 206, [2009] F.C.J. No. 229 at para. 22; *Kniazeva v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 268, [2006] F.C.J. No. 336 at para. 15; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 53. Questions of procedural fairness are to be determined on a correctness standard: *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221.

[16] In argument before this Court, the Applicant states that the appropriate calculation for the length of her education is 15 years: seven years of primary school, five years for her O Levels, one year of study toward her A Levels, plus two years for her medical secretarial certificate.

[17] A serious problem with this argument is that it is not the same calculation as the evidence set out in the application before the Officer. The initial application estimated 10 years of primary education, but provided no explanation for how this was calculated. The application also stated that Ms. Roberts had six years of secondary school, from 1980-1986, but her graduation certificate indicates an end date of summer 1985. It was only in an affidavit sworn for the purposes of this judicial review that the Applicant explained she spent an additional year working toward her A Level qualification during the 1985-1986 year. However, this explanation was not before the Officer at the time of the decision when she made specific mention of an "unexplained gap" in the application between summer 1985 and 1986.

[18] Even if it had been before the Officer, the extra year of A Level study would not be relevant to the assessment of education credentials. In *Bhuiya v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 878, [2008] F.C.J. No. 1110, Justice Anne Mactavish explained that "the years of education requirement is clearly intended to establish minimum standards for each type of degree" and the fact that an applicant may have spent one additional year in school after obtaining their degree "does not turn a 16 year Master's degree into a 17 year Master's degree". That same logic applies here: the fact that the Applicant spent an extra year in school after obtaining her O Levels does not turn an 11-year diploma into a 12-year one.

[19] With respect to the Applicant's claim to the number of years it took to complete her O Levels, the statement in her application that she spent 10 years in primary school was clearly wrong and the Applicant provided no additional explanation or clarification as to how she reached that calculation. Thus the Officer had to use her best judgment to assess the appropriate amount of years of education which led to the good faith conclusion that O Level studies require 11 years to complete. There was nothing unreasonable about this conclusion.

[20] The Applicant further argues that the Officer owed her a duty of fairness to request further information, since she doubted the Applicant's claim to the number of years of education. It is well established that there is no duty for an officer to provide an opportunity to an applicant to address concerns the officer may have: *Santhirasegaram v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1187, [2008] F.C.J. No. 1466 at para. 32; *Ramos-Frances v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 142, [2007] F.C.J. No. 192; *Ahmed v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 940 at para. 8 (F.C.T.D.).

[21] In the words of Justice Marshall Rothstein (as he then was) in *Lam v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1239 (F.C.T.D.) at para. 4 “the onus is on an applicant to file a clear application together with such supporting documentation as he or she considers advisable. The onus does not shift to the visa officer and there is no entitlement to a personal interview if the application is ambiguous or supporting material is not included”. Accordingly, Ms. Roberts was required to satisfy the Officer that she did, in fact, have at least 14 years of study and there was no requirement on the Officer to seek out clarification or supporting documentation if the application was deficient. I find for this reason that there was no breach of the duty of fairness as the officer did not find any ambiguity in the number of years of completed study on the part of the applicant.

[22] Only after the negative decision was reached did the Applicant take the necessary steps to prove her claim, and while Ms. Roberts did provide additional evidence to the Officer in the form of the letter from Mr. Andrews attesting to the fact that it took her 12 years to receive her O Level qualification, the Applicant concedes that the Officer was not required to consider submissions made after the decision had been rendered.

[23] Finally, the Applicant argues that the Officer erred by failing to properly exercise her discretion pursuant to section 76(3) which, notwithstanding a shortfall in points, permits a visa officer to substitute her own evaluation of the likelihood that an applicant may become economically self-sufficient in Canada. The Officer declined to exercise her discretion favourably in this case on the basis that the points awarded to Ms. Roberts were “an accurate reflection” of the likelihood that she would become economically established in Canada. The Applicant’s position is that the Officer failed to provide any analysis of why she declined to exercise her discretion other

than that it had been considered and rejected, and that the failure to provide any explanation for doing so was unreasonable.

[24] As a preliminary note on this point, I am mindful of the decision in *Poblado v. Canada*, 2005 FC 1167, [2005] F.C.J. No. 1424, in which Justice Konrad von Finckenstein held that a visa officer merely has to inform the applicant that they considered the request for a favourable exercise of discretion. However, that is not to say that merely informing an applicant that their request to exercise discretion was considered is sufficient to discharge the obligation to properly consider the request.

[25] Any consideration of substituted evaluation is not limited to the assessment of points, and should include consideration of all factors set out in section 76(1). The failure to consider a relevant factor may result in an unreasonable decision. For example, in *Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1398, [2004] F.C.J. No. 1698, Justice Elizabeth Heneghan at para. 19 commented that the exercise of discretion pursuant to section 76(3) "requires consideration of settlement funds when deciding to make a substituted evaluation of a person's ability to become economically established in Canada. See also *Choi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 577, [2008] F.C.J. No. 734; *Lackhee v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1270, [2008] F.C.J. No. 1615.

[26] In *Hernandez*, *Choi*, and *Lackhee* the Court found that the officer's failure to make any reference to the settlement funds available to the applicant, either in the CAIPS Notes or the decision, indicated a failure to consider the likelihood of the applicant to become economically self sufficient and amounted to a reversible error.

[27] However, that is not the case here. The CAIPS Notes indicate that the Officer considered that the Applicant had approximately 60,000 British pounds in settlement funds available, and establish that the Officer considered her education, work history, age, language skills and adaptability. Nevertheless, the Officer determined Ms. Roberts did not warrant a substituted evaluation, and believed the points awarded accurately reflected the likelihood of the Applicant's ability to become economically established in Canada.

[28] While in my view the Officer's decision was somewhat harsh given the Applicant's general skills and qualifications, it was within the range of possible outcomes and was not unreasonable. Regardless of what other decisions were available to the Officer in these circumstances I am satisfied that the Officer made no error in reaching her decision.

[29] Accordingly, this application for judicial review must be dismissed. No question of general importance was submitted for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed.

"Max M. Teitelbaum"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4054-08
STYLE OF CAUSE:	JOANNA CATHERINE ROBERTS v. MCI
PLACE OF HEARING:	Toronto, Ontario
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