Federal Court  Cour fédérale

Date: 20130708

Docket: IMM-8253-12

Citation: 2013 FC 761

Vancouver, British Columbia, July 8, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

NEDA REZAEIAZAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act) for judicial review of the decision of a Visa Officer (Officer) of the Embassy of Canada, Visa Section, in Ankara, Turkey, dated 28 June 2012 (Decision), which refused the Applicant's application for permanent residence in Canada as a member of the Federal Skilled Worker class.

BACKGROUND

[2] The Applicant is a 41-year-old citizen of Iran. She manages the visual arts department at Islamic Azad University, and applied to immigrate to Canada as a Federal Skilled Worker under National Occupation Code (NOC) 4121 – University Professor.

[3] After submitting her application in October, 2010, Applicant was informed by way of a "procedural fairness letter" dated 9 May 2012 (Applicant's Record, page 12) that the Officer had concerns that the number of points she had been awarded under the Federal Skilled Worker grid did not reflect her actual potential to become economically established in Canada. The Officer was concerned about the Applicant's inability to read English, as she scored zero points for reading on her International English Language Testing System (IELTS) exam. The Officer was also concerned that the Applicant's lack of teaching experience in English or outside Iran would make it very difficult for her to find employment as a university professor in Canada. The Officer was also concerned about the Applicant's ability to find work in graphic design, as it is a very competitive field and the Applicant's experience was gained over 10 years ago and in an environment very different from Canada. The Applicant was not called in for an interview, and was given 45 days to submit further information to address the Officer's concerns.

[4] In response, the Applicant sent in submissions and documentation that she thought would address the concerns. She explained that she had not pursued a PhD because there was no such program in Iran, and that she had been managing the visual arts department at her university for two and a half years. The Applicant authored a book called "Application of Graphics in Cartography"

in 2007, and has written many articles in her field. The Applicant also has significant research experience, and has used both field research and library research in her works.

[5] The Applicant helped to found a visual arts journal, and is on its editorial board. She has been working as a university professor for more than ten years, teaching courses that are similar to ones offered in Canada. The Applicant also has experience using a variety of computer design programs, and in designing sales catalogues and advertisements. She is a member of the Iranian Graphic Designer Society, which is a recognized member of the International Council of Graphic Design Associations. This means that the experience the Applicant has gained through the Iranian Graphic Designer Society meets most international standards.

[6] As regards to her language skills, the Applicant submitted that she has been attending English classes over the past year, and that her former test scores no longer reflect her language abilities. She told the Officer that she would be able to provide updated test scores if she could have more than 45 days to do so, as it takes longer than that to register and take the test. The Applicant explained that she had no reason to take the test earlier, as she did not think she needed any additional points to get into Canada since she was already over the threshold. The reason the Applicant was working on her English was to get ready to move to Canada.

[7] Because the Applicant could not get new test scores to the Officer in time, she provided the Officer with a letter from her English instructor. The instructor said that he expected the Applicant would have a very high level of conversational English by the end of the term. The Applicant finished her third level (advanced level) on 10 October 2012, and the instructor said that he

expected the Applicant would get at least IELTS 6.5 if she took the IELTS exam again. The Applicant indicated that she had every intention of continuing to work on her English skills until she achieves a score of 7 on the exam, which is what is necessary to attend graduate schools in Canada.

[8] The Applicant's brother has indicated that he will provide her with employment at his Swiss Chalet franchise or his dry cleaning store if she is not able to obtain employment or pursue further studies when she first arrives in Canada. The Applicant says in her affidavit that her brother did not indicate the kind of work the Applicant would be doing at the Swiss Chalet restaurant because he believed it was obvious from the Applicant's background that she would be working on graphic design projects. The Swiss Chalet is a bigger business that requires more promotion than the dry cleaning store, so the Applicant's brother did not include a letter from the dry cleaning store.

[9] The Applicant explains in her affidavit that her husband is an experienced interior designer, and the Applicant's brother is also willing to offer employment to the Applicant and her husband to redo the interior of the dry cleaning store. The Applicant's husband also has a job offer from Daryoush Firouzli Architecture Inc., which is located in British Colombia. His language ability was estimated by the instructor to be around an IELTS 5. The Applicant says that she did not include this information in her submissions to the Officer because she did not think her husband's employability or language ability was at issue.

[10] On 28 June 2012, the Applicant received a letter from the Officer rejecting her application.

DECISION UNDER REVIEW

[11] The Decision in this case consists of the letter dated 28 June 2012 (Refusal Letter), as well as the Global Case Management System (GCMS) Notes made by the Officer.

[12] The Officer explained that subsection 75(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations), prescribes a class of persons who may become permanent residents on the basis of their ability to become economically established in Canada. Skilled workers are assessed based on the criteria set out in subsection 76(1), and subsection 76(3) permits an officer to substitute his or her own evaluation of the applicant's ability to become economically established in Canada if the number of points awarded is not considered a sufficient indicator.

[13] In the Notes dated 7 May 2012, the Officer noted that the Applicant remained at university after obtaining her Master's degree, and has no work experience outside of an academic environment. There was no evidence she has participated in any academic conferences outside of Iran, or that she has travelled to any Western country for any reason. The Officer found two of her publications referenced on the internet, but only in Farsi.

[14] In the entry dated 7 May 2012, the Officer pointed out that the Applicant obtained a score of 5 on her IELTS English test, meaning basic competence in the language, but she scored a 0 for reading. The Officer stated that her inability to read English would be a crucial obstacle for someone hoping to work in a field so dependant on written communication. With no academic

experience outside of Iran or in English, the Officer thought it unlikely that she would be able to obtain a university teaching position or a comparable job in Canada.

[15] The Officer pointed out that the Applicant's other work experience is as a graphic designer. This is an economically difficult field for all but the very best, and the Officer noted that the Applicant's experience was obtained over 10 years ago and in an environment very different than Canada. The Officer noted that the Applicant had a relative in Canada who could be useful in securing employment, but in this case the Officer thought such help would be limited to social and logistic processes.

[16] The Notes dated 26 June 2012 review the Applicant's submissions to the procedural fairness letter. The Applicant reaffirmed her desire to find work as a university professor in Canada, but the Officer believed that her lack of a PhD and limited language skills would present a large obstacle, despite her financial abilities and family support in Canada. Just because there are no PhD programs available in Iran does not change the fact that such a qualification would be required for the Applicant to obtain work in Canada. The Officer also stated that the scholarly article written by the Applicant did not appear similar to what is found in most scholarly journals, as it was written in general language. The Officer noted that the Applicant had been improving her English language skills, but he did not think it was credible that she would wait to take the IELTS test again, considering she said she wished to pursue a PhD in Canada.

[17] The Officer stated that, after considering the Applicant's submissions, the concerns discussed in the procedural fairness letter remained. In addition, although the Applicant's brother

provided a letter saying he would employ her at his Swiss Chalet restaurant, the letter did not say whether this would be in a skilled position. Given the Applicant's lack of experience in the restaurant industry, the Officer thought this unlikely, and the Applicant's working in an unskilled position cannot be considered as establishing economically in Canada as a skilled worker. The Officer noted there was no indication of the Applicant's husband's language skills or ability to find a job in Canada.

[18] The Officer also noted that another senior officer concurred in this substituted evaluation, and thus refused the Applicant's application.

ISSUES

[19] The Applicant raises the following issue in this application:

a. Did the Officer breach the principles of procedural fairness by failing to raise his concerns with the Applicant in a way that enabled her to properly respond?

b. Was the Officer's exercise of discretion unreasonable?

STANDARD OF REVIEW

[20] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 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.

[21] In the first issue, the Applicant questions her opportunity to adequately respond to the Officer's concerns. This is a matter of procedural fairness (*Kuhathasan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 457 at paragraph 18), and as stated by the Supreme Court in *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 SCR 539 at paragraph 100, "it is for the courts, not the Minister, to provide the legal answer to procedural fairness questions." Accordingly, this issue will be reviewed on a standard of correctness.

[22] The second issue is a review of the exercise of the Officer's discretion in consideration of the Applicant's application. This is reviewable on a standard of reasonableness (*Kniazeva v Canada (Minister of Citizenship and Immigration)*, 2006 FC 268; *Ali v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1247; *Hamza v Canada (Minister of Citizenship and Immigration)*, 2013 FC 264).

[23] 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 *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 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."

STATUTORY PROVISIONS

[24] The following provisions of the Act are applicable in these proceedings:

Application before entering Canada	**Visa et documents**
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.

[25] The following provisions of the Regulations are applicable in this proceeding:

Class	**Catégorie**
75. (1) For the purposes of subsection 12(2) of the Act, the federal skilled worker class is hereby prescribed as a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada and who intend to reside in a province other than the Province of Quebec.	**75.** (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des travailleurs qualifiés (fédéral) est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada, qui sont des travailleurs qualifiés et qui cherchent à s'établir dans une province autre que le Québec.

[…]

Selection criteria

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,

(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…

[…]

Circumstances for officer's substituted evaluation

[…]

Critères de sélection

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 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

[…]

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

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) — n'est pas un indicateur suffisant de 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).
[…]	[…]

ARGUMENTS

The Applicant

Procedural Fairness

[26] The Applicant points out that when an officer is exercising his or her discretion by conducting a substituted evaluation, the duty of fairness is heightened. As stated by the Federal Court of Appeal in *Sadeghi v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FC 337 [*Sadeghi*],

> 14 It is important to emphasise the particular context in which this question of procedural fairness arises. Subsection 11(3)(b) is an extraordinary power intended for exceptional cases, and does not provide visa officers with a general discretion to revisit their assessment under the specific selection criteria or to support a view that the applicant does not in some way quite "measure up": see *Chen, supra*, [1991] 3 F.C. 350 at 363. The important statutory purpose served by the requirement that independent applicants for permanent residence visas be assessed in accordance with the

> prescribed statutory selection criteria is to ensure a certain objectivity and uniformity in decision-making by visa officers.
>
> 15 Hence, in exercising the power conferred by paragraph 11(3)(b) the visa officer made a discretionary decision depriving the appellant of his legitimate expectation that, having satisfied the specific statutory selection criteria, most of which are geared towards assessing an applicant's prospects for becoming economically established in Canada, he would be issued with a visa, unless he was found inadmissible under subsection 19(1) of the Immigration Act. Decisions removing a person's legitimate expectation of receiving a benefit typically attract greater procedural protection than those where the discretion is at large.
>
> […]
>
> 17 In order to ensure that visa officers base their opinion that there are good reasons for thinking that the points evaluation does not adequately reflect an applicant's chances of becoming successfully established in Canada, it is important that they raise their concerns with the individual in a way that enables her or him to respond, at least when they are of the kind on which the applicant may be able to shed some useful light. Accurate decision-making is particularly important when an adverse decision may deprive a person of her legal rights or, as here, a legitimate expectation of receiving a statutory benefit.

[27] The Applicant submits that in this case the Officer's concerns were not presented to her in a way that enabled her to adequately respond. For example, the Officer indicated in the fairness letter his opinion that the Applicant's brother would be of limited help in finding employment in Canada. In response, the Applicant submitted a letter from her brother wherein he states he is willing to provide her with employment at his Swiss Chalet restaurant if she has initial difficulties finding employment in her own field in Canada.

[28] The Officer dismissed this letter on the grounds that the employment offered would likely not be in a skilled worker position. However, as the Applicant states in her affidavit, her brother intended to hire her as a graphic designer. The Applicant did not think that it was necessary to

include this information in her letter, as the Officer's concerns were simply stated as being whether her brother would not be of assistance in finding employment.

[29] The Applicant submits that, based on *Sadeghi*, if the Officer had concerns about her letter, they should have been presented to the Applicant. The Officer even acknowledged that he or she was not sure what sort of employment the Applicant would be undertaking at the restaurant, yet the Officer refused the application before requesting any further information.

[30] The Applicant states that a similar situation occurred in *Vandi v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 515, where the Court said that

> 9 … The visa officer herself, in her refusal letter, questions what the applicant means, but she fails to follow through on her concern and get more answers from the applicant. The questions that were posed by the visa officer related to the amount of interior design work that had been done by the applicant in pursuing the architectural licence, and were not strictly related to the motivation of the applicant as a reason for not pursuing this occupation in Canada.

[31] The letter provided by the Applicant's brother addressed the concern as stated by the Officer in the procedural fairness letter, and had the Officer properly advised the Applicant she could have easily provided the Officer with information about the type of work she would potentially be doing for her brother.

[32] The procedural fairness letter also did not suggest that there were any issues about the Applicant's husband's language skills. Yet, from looking at the Notes, it is clear that this was a factor considered by the Officer in rendering a negative substituted evaluation. As this contributed to the Officer's final determination, the Officer had an obligation to bring it forward in the

procedural fairness letter. The Applicant submits that the Officer's failure to do so constitutes a breach of procedural fairness.

[33] The Applicant further submits that the Officer's adverse credibility finding about her language ability mandated that more information be sought, or that an interview be granted, before a final decision was rendered. The Applicant provided corroborative evidence from her language instructor that demonstrated her ongoing language training. The Applicant also indicated a willingness to take another official language test if given an appropriate amount of time to do so. There is no reason why these submissions should have raised credibility concerns with the Officer. However, as they did raise concerns, the Applicant submits that the Officer should have sought clarification before drawing an adverse inference.

[34] As the Federal Court said in *Talpur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 25,

> 21 It is by now well established that the duty of fairness, even if it is at the low end of the spectrum in the context of visa applications (*Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 at para 41; *Trivedi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 422 at para 39), require visa officers to inform applicants of their concerns so that an applicant may have an opportunity to disabuse an officer of such concerns. This will be the case, in particular, where such concern arises not so much from the legal requirements but from the authenticity or credibility of the evidence provided by the applicant.

[35] The Applicant points out that it was only after attempting to address the concerns of the Officer outlined in the procedural fairness letter that the issue of credibility arose. As such, the Officer was under an obligation to provide the Applicant with an opportunity to allay these new

concerns. By not providing the Applicant with such an opportunity, the Officer breached the principles of procedural fairness.

The Reasonableness of the Decision

[36] In the alternative, the Applicant submits that the Officer's decision was unreasonable. There is a heavier onus on an officer to justify the exercise of negative discretion with respect to a substituted evaluation than there is with a refusal to exercise positive discretion (*Hameed v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 10 (FCA)).

[37] In her response to the procedural fairness letter, the Applicant indicated that she has been attending intensive language training courses in order to improve her English. This was corroborated in the letter from the Applicant's language teacher, who said that the Applicant would have strong conversational English by the end of the term. The Applicant was also willing to undertake another test. However, the Officer dismissed all of this by simply questioning why the Applicant had waited to take another test; the Applicant submits that this summary dismissal of such important evidence constitutes a reviewable error.

[38] The Applicant says it was unreasonable for the Officer to have credibility concerns with her evidence, or to conclude that the Applicant's submissions were not accurate. The Officer should not have dismissed this important evidence on the grounds that the Applicant should not have waited to take the IELTS exam again, when there was no reason the Applicant would have done so at the time the procedural fairness letter was sent. The Applicant had no reason to believe her language skills would be a barrier to her entrance to Canada given that she had met the requisite amount of points required; she was taking the training so that she would have an easier time adapting to life in

Canada. The Applicant submits that if anything this should have weighed in her favour, demonstrating her determination and willingness to adapt. At a minimum, it was unreasonable for the Officer to draw an adverse inference from her failure to take a test that she had no reason to take. Given that the Applicant's language skills were the main reason why the Officer believed she would not be able to pursue a career as a college instructor, the Applicant submits that this was a major error.

[39] The Applicant further submits that the Officer erred by not considering her ability to take steps once in Canada to ensure that she becomes economically established. The Applicant indicated in her submissions that she was willing to enrol in a Canadian PhD program, continue her language training and work for her brother at his restaurant until she is able to secure a position as a professor in Canada. Thus, the Applicant was both willing and able to take the necessary steps to overcome all of the Officer's concerns (her lack of doctorate, lack of "western" experience, lack of proficiency in English). The Applicant also demonstrated that she has sufficient financial resources to support herself during the transition period.

[40] In *Margarosyan v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1538 (TD), the Federal Court made it clear that an applicant does not have to become economically established immediately upon arrival in Canada. The Applicant submits that, given her overall points score and her willingness to ensure she is successful upon her arrival in Canada, the evidence before the Officer indicated that even if she would not be able to become economically established immediately upon arrival in Canada, she would be able to do so within a reasonable period of time. The evidence indicated that the Applicant is a highly motivated and skilled individual, who has the means and is willing to take the steps necessary to ensure she becomes economically established.

The Act dictates that the Officer consider the Applicant's overall ability to establish herself, and the Applicant submits that the Officer failed to do this.

[41] The Applicant also submits that the Officer erred by putting too much emphasis on the Applicant's alleged lack of "global experience," which is not set out in the NOC as a requirement. As was stated in *Dogra v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 560 [*Dogra*],

> 27 Even though neither the CCDO, nor the NOC was designed for the purpose of evaluating the "market readiness" of applicants for permanent residence in Canada, I incline to the view that it is not normally appropriate for visa officers to engage in the exercise of assessing the "Canadian relevance" of applicants' education, training and experience when they are consistent with the terms of the statutory criteria.
>
> 28 For one thing, assessing the "Canadian equivalents" of overseas qualifications and experience is a task that may be better left to national accreditation committees and provincial licensing authorities. Busy visa officers may not be well equipped to make these kinds of assessments in the limited time available for the interview, which must also canvass other aspects of the application.
>
> 29 Moreover, immigration policy is placing increasing emphasis on applicants' adaptability and flexibility, characteristics that are particularly important in the contemporary labour market. Hence, applicants' level of education and active labour market participation are likely to be of more importance in predicting successful establishment in Canada than the possession of a store of specific knowledge.
>
> 30 There is also, of course, legal authority for the proposition that visa officers may not reject applicants by reference to criteria that are not included in the CCDO, the NOC or the Regulations themselves: see, for example, Lee v. Canada (Minister of Citizenship and Immigration) (1995), 29 Imm. L.R. (2d) 222 (F.C.T.D.).

[42] Given the above, the Applicant submits that the Officer erred by putting too much emphasis on the Applicant's lack of "western" or "global" experience when making the determination that a negative substituted decision was warranted.

The Respondent

Procedural Fairness

[43] The Respondent submits that there was no breach of procedural fairness as alleged by the Applicant. In the procedural fairness letter, the Officer spelled out the concern that the Applicant would be seeking a university teaching job or other comparable position in Canada, but had scored a zero for reading in English. The Officer was also concerned about her lack of teaching experience outside Iran or in English.

[44] The Applicant argues that the Officer should have sought clarification about the kind of employment her brother was willing to offer her at the restaurant. However, once the Applicant has been given the opportunity to address concerns listed in the procedural fairness letter, the Officer is under no obligation to request that better, further evidence be produced or to engage in further dialogue with the Applicant to clarify her evidence (*He v Canada (Minister of Citizenship and Immigration)*, 2012 FC 33 at paragraph 30 [*He*]; *Heer v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1357 at paragraph 19).

[45] As to the clarity of the procedural fairness letter, the Respondent submits that it was sufficiently specific: it set out the concerns and factors giving rise to the concern. The Applicant asserts that she was not given enough guidance, but it is the Applicant who must establish that she

has met the criteria to enter Canada, including her ability to establish herself economically. There is no obligation on the Officer to guide her on how to meet these criteria.

[46] It is also not correct that the level of procedural fairness appropriate for visa applications is raised when a visa officer makes a substituted evaluation. The obligation on the Officer is simply to adopt an appropriate line of questioning and make reasonable inquiries (*Sivayogaraja v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1112 at paragraph 15).

[47] The Applicant argues she should have been given a third opportunity to provide information about what exactly she would be doing at her brother's Swiss Chalet, but there was no duty on the Officer to provide her with such an opportunity. If her brother's letter was not clear that the Applicant would be working as a graphic designer for his Swiss Chalet restaurant (and the Applicant admits one has to infer this fact), this ambiguity or failing cannot be attributed to the Officer. As was said in *Silva v Canada (Minister of Citizenship and Immigration)*, 2007 FC 733 at paragraph 20:

> I am of the view that the principles of procedural fairness have not been breached in the circumstances of this case. The onus is on the Applicant to provide all relevant supporting documentation and sufficient credible evidence in support of his application. In her decision letter, the Officer clearly stated that the Applicant had not discharged this onus. It is for the Applicant to put his best case forward. See *Lam v. Canada (M.C.I.)* (1998) 152 F.T.R. 316 (T.D.). The onus does not shift to the Officer and there is no entitlement to a personal interview if the application is ambiguous or supporting material is not included. Here, there was no obligation on the Officer to gather or seek additional evidence or make further inquiries.

[48] The Applicant also argues that she should have been provided with an opportunity to meet the Officer's concerns about her husband. However, these concerns did not form part of the initial reasons for the substituted evaluation or the final reasons thereof. Therefore, there was no duty on

the Officer to apprise the Applicant of them (*Asghar v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 1091 at paragraph 21).

[49] As to the Applicant's argument that she should have been provided with another opportunity to address the Officer's concerns that arose after her response to the procedural fairness letter, the Respondent submits that no such "new" concerns exist on the record. Nor has the Applicant pointed to any.

The Reasonableness of the Decision

[50] As regards the Applicant's submissions on her planned language training and PhD program, even if the Officer did not consider these factors, there is no error. These factors relate to future events, and the Officer did not err by not engaging in speculation.

[51] As to the assertion that the Officer put too much emphasis on the Applicant's lack of western experience, the Respondent submits that an officer may take into account the relevance to the Canadian context of an applicant's experience in her intended occupation under the residual discretionary authority exercisable under subsection 76(3) of the Regulations (*Gracheva v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 939 (TD) [*Gracheva*]).

[52] There was ample evidence before the Officer to support a negative substituted evaluation, and the Court has upheld such substituted evaluations in other cases (*Kainth v Canada (Minister of Citizenship and Immigration)*, 2007 FC 175 [*Kainth*]; *Wai v Canada (Minister of Citizenship and Immigration)*, 2009 FC 780).

The Applicant's Reply

[53] The Applicant submits that the decision in *Kainth*, which the Respondent relies upon, involves very different facts than those in this case. Although both cases involve a concern about the applicant's language abilities, in *Kainth* the applicant indicated he no longer wished to pursue the occupation under which he had applied. That case also involved an issue of whether the officer had "double counted" the applicant's language abilities. Therefore, the Respondent's reliance on *Kainth* is misplaced.

[54] The Respondent relies on paragraph 30 of *He*, above, to support the contention that the Officer met the duty of fairness owed to the Applicant. However, this paragraph actually supports the Applicant's position:

> The Applicant relies on *Guo v Canada (Minister of Citizenship and Immigration)*, 2006 FC 626, 148 ACWS (3d) 975, for her assertion that the Decision Maker should have sought further evidence if he was not satisfied with the explanations provided as a result of the fairness letter. In that case, there was simply no evidentiary record to allow the immigration officer to disbelieve the applicant. In the present case, however, there was an evidentiary record upon which one could find that the Applicant misrepresented her employment at the Company. This case is therefore closer to a decision rendered in *Ni v Canada (Minister of Citizenship and Immigration)*, 2010 FC 162, wherein Justice Zinn similarly found that it was reasonable not to make further follow-up inquiries. The Respondent also correctly cites *Heer v Canada (Minister of Citizenship and Immigration*), 2001 FCT 1357, 215 FTR 57, for the proposition that once the applicant has been given the opportunity to address concerns, the officer is under no obligation to request that better, further evidence be produced (at para 19).

[55] There is no assertion that the Applicant engaged in any kind of misrepresentation, and the Applicant submits that her case is more similar to *Guo*, cited above, than *He*. Furthermore, the

Applicant reiterates that she was not given a fair opportunity to address the Officer's concerns as they were either not put to her at all or were not adequately outlined in the procedural fairness letter.

[56] Furthermore, the Respondent's assertion that the Officer's failure to consider the Applicant's ongoing language training and ability to enrol in a PhD program in Canada is reasonable because "both factors relate to future events" is not substantiated by any jurisprudence. These were both important factors in the Officer's negative substituted evaluation, but they should not have been, considering the evidence.

[57] The Applicant further submits that the Respondent's assertion that the Officer did not place too much emphasis on the Applicant's lack of western experience is unpersuasive. While this Court has held that in some cases it is acceptable to look at an applicant's "western experience," it is generally only in cases such as *Gracheva*, relied on by the Respondent, where the occupation for which the applicant is applying requires certain knowledge of principles that are unique to a Canadian or western profession, such as the Generally Accepted Accounting Principles for an accountant. Such is not the case with the position of university professor and the Applicant reiterates that the Officer placed undue importance on this factor.

ANALYSIS

[58] In oral argument the Respondent asserted that the GCMS Notes do not form part of the Decision in this case. On this point, I have to agree with the Applicant, that the GCMS notes in this application form part of the reasons for the Officer's Decision. Justice John O'Keefe in *Veryamani v Canada (Minister of Citizenship and Immigration)*, [2010] FCJ No 1668 specifically found that "…the case law is clear that the CAIPS notes form part of the reasons for the decision."

[59] Within his decision in *Veryamani*, Justice O'Keefe reviewed the case law at paragraphs 28 – 31 and cites Justice Michael Phelan, in *Ziaei v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1169, 66 Imm. L.R. (3d) 287 at paragraph 21:

> It is well recognized that the visa decision letter may not contain all of the reasons for a decision. For that reason, the CAIPS Notes form an integral part of the reasons.

[60] It may be that, in some cases, a decision letter may contain the whole of a decision, but that is not the case with the present application where, in my view, the Decision cannot be fully understood without reference to the GCMS notes.

[61] This case raises several unusual issues with regards to substituted evaluation. Although the Applicant scored 70 points under the scheme set up pursuant to section 76 of the Regulations, her points score did not, in the opinion of the Officer, reflect the Applicant's actual potential to become established in Canada as a University Professor. Hence, her application was denied by way of substituted evaluation under subsection 76(3) of the Regulations.

[62] The Fairness Letter of May 9, 2012 provided the Applicant with the basis for the concern that her score of 70 was not a sufficient indicator of her ability to become economically established in Canada. The concern was based upon the following factors:

a. The Applicant has a Masters degree from Islamic Azad University where she is an instructor. Her only experience is related to this environment and she has never traveled to a Western country or to international conferences;

b. The Applicant only has one or two publications, and these are only published in Farsi;

c. The Applicant does not have a PhD and she has not begun a PhD program;

d. The Applicant's IELTS English score was low, and she scored zero for reading;

e. The Applicant has no academic experience outside of Iran or in English. The Applicant's inability to read English is "a crucial lacuna for someone hoping to work in the field so dependent on written communication";

f. The Applicant's other work experience as a graphic designer is taken into account, but this does not overcome the difficulties because the "experience was over 10 years ago and in a very different environment from Canada" and "the visual arts are a difficult field economically for all but the very best";

g. The Applicant has also received five points for having a relative in Canada, but this does not alleviate the concerns because his help "would be limited to social and logistic processes."

[63] With these concerns in mind, the Applicant was told that the officer who wrote the Fairness Letter intended to use negative substituted evaluation and refuse the application, but the Applicant was given the usual 45 days within which to provide "additional information and reasons" that might cause the officer to reach a different conclusion regarding her ability to establish economically in Canada.

[64] In a letter dated June 16, 2012, the Applicant provided her response to the concerns raised in the Fairness Letter. In general, she did not dispute the officer's assessment that, as things stood, she would not be able to establish economically in Canada as a University Professor. Her approach was

to try and demonstrate that, if she came to Canada, she would eventually be able to qualify herself sufficiently to become a University Professor. She answered the specific concerns raised in the Fairness Letter in the following ways:

a. The reason she does not have a PhD is that Islamic Azad University does not offer doctoral programs in visual arts and there are "very few opportunities for and very limited grounds for academic progress in the field of visual arts in Iran." The Applicant has looked at neighbouring countries such as Armenia, but there are "no doctoral degree programs available in graphics";

b. In order to remedy the PhD deficiency she proposes "to work as an assistant professor in a country like Canada and also I am very enthusiastic to continue my studies at the doctoral level";

c. The Applicant also cites her husband as a means to assist her in achieving her goals. He has skills in architectural and civil engineering and "has always been working abreast with me and I am confident that with our cooperation and combined efforts we will be more successful together in Canada";

d. As regards the concerns over her lack of experience, the Applicant points to her activities in the visual arts department at Islamic Azad University, refers to a book she authored in 2007 and the articles she has written and her editorial work with Naghshmayeh, an academic-research quarterly dedicated to visual arts at the Islamic Azad University. She makes no attempt to address the concern that she has only worked in Farsi at a single university in Iran and has no international experience.

The additional experience she cites is her attendance at the "limited fairs and seminars in Iran";

e. With regard to the Applicant's lack of ability in English, which the Fairness Letter identified as "a crucial lacuna for someone hoping to work in the field so dependent on written communication," the Applicant says she has "been trying to promote my language skills" and that, if she had more than 45 days she would "register for IELTS exam" and, in any event, she would "certainly register for the test, and given the progress I have made in all the skills, I will positively gain high grades." In conjunction with this assertion, the Applicant provides a letter from her English instructor which attests to the classes she had been taking, what she has passed and what she is expected to achieve by the end of her course: "I expect that she will get to a perfect level of conversation in English at the end of the term." The instructor's letter says nothing about expectations in reading and writing, which were the emphasis in the Fairness Letter so that, in this regard, the Applicant cannot be said to have fully responded to the language concerns. In addition, although the Applicant says that she would take the IELTS exam if she had more time than 45 days, she does not formally request an extension of time to allow her to do this;

f. The Applicant also submits a letter from her brother who lives in Toronto and has run a Swiss Chalet franchise business since 2009 that employs over 35 full-time and part-time staff. He says he would "guarantee employment for my sister and her husband for the first two years in Canada, or, until they are settled in their field of

> work." He also says that "I will be able to support their move to Canada in many different ways, including providing necessary employment."

[65] As can be seen from this list, apart from the brother's letter which demonstrates that the Applicant has more than just social and logistical support from her family (unless, of course, logistical was intended to include financial support), the Applicant's response provides no immediate solutions to the concerns raised in the Fairness Letter but, in effect, says that the Applicant hopes and believes that she can rectify the defects in her qualification for a position as a University Professor if she is allowed to come to Canada and avail herself of the opportunities that await her here.

[66] The Decision letter says that the application is refused for the reasons given in the Fairness Letter and only makes further comment on the brother's letter:

> As explained to you in the procedural fairness letter sent to you on May 9, 2012, I am not satisfied that the points that you have been awarded are an accurate reflection of the likelihood of your ability to become economically established in Canada. I have made this evaluation for the same reasons explained in the procedural fairness letter. In addition, although you provided a letter from your brother, stating that he will employ you at his Swiss Chalet restaurant, he has not indicated whether this would be in a skilled position (NOC level O, A or B). With your lack of prior experience in the restaurant industry, it is unlikely that he would employ you in a skilled position. You were given an opportunity to address these concerns by replying to the procedural fairness letter. The information you have given me and your explanations have not satisfied me that you will be able to become economically established in Canada. A senior officer concurred in this evaluation.

[67] The comment on the brother's letter is significant. It demonstrates that the Officer is obviously of the view that any support from the brother would have to come in the form of a

"skilled position," and that it is not sufficient for the brother to offer financial and other support "until they are settled in their field of work."

[68] The GCMS Notes that deal with the Negative Substituted Evaluation Assessment make the following points:

a. The Applicant's efforts to improve her English are noted but no new IELTS results are submitted and it is "unlikely that PA will be able to secure skilled employment with such a low proficiency in reading English";

b. The Applicant's explanation about the unavailability of PhD programs in Iran "does not change the fact that someone without a PhD is unlikely to obtain a professor position in Canada (as PhD degrees in visual arts are available in Canada, as well as in other countries)";

c. The Applicant's professional activities in Iran are noted but "this does not change the fact that lack of participation in international research/study/conferences would likely make her unemployable in Canada as a professor";

d. The brother's offer of support is noted but "it seems unlikely that her brother (though a relative) would put her into a skilled position at his restaurant (such as in (*sic*) an assistant manager, Chef or accountant position, etc.) as these require prior experience/training";

e. "PA has not indicated any experience in the private sector in graphic design to show that she could work in the very competitive graphic design private sector in Canada";

f. "PA has not indicated experience/training in any other field to be able to secure skilled employment in Canada";

g. "PA states that her husband has experience in architecture and civil engineering. No indication of whether he has any English/French proficiency to allow him to find a job in his field in Canada."

[69] Against this background, the Applicant raises several allegations of reviewable error, and I will deal with them in turn.

Breach of Procedural Fairness

[70] The Applicant says that the Officer failed to effectively present her with his concerns in the Fairness Letter and therefore did not raise his concerns in a way that enabled her to respond.

[71] The Fairness Letter says that the concern regarding the brother is that assistance would be "limited to social and logistic processes." It does not specifically say that the brother would not be able to provide "skilled worker" employment, which is the reason given for discounting the brother's offer of employment in the Decision. Hence, the only way the Applicant could know that her brother's support needed to be in the form of a skilled position would be if the governing legislation and jurisprudence require this. The purpose of the brother's support, as his letter makes clear, is to "guarantee employment for my sister and her husband for the first two years in Canada,

or, until they are settled in their field of work. " This letter is clearly not intended to guarantee skilled employment but it does promise the necessary economic support to the Applicant and her spouse until they achieve their professional goals in Canada. In the end, the Officer does not address the issue of whether the Applicant's demonstrable economical viability in Canada is required to be as a skilled worker. The Officer simply assumes that this is a requirement. If it is not, then there is a fundamental error with the Decision. I will come to this issue later.

[72] The Applicant also says that the Fairness Letter did not suggest that there were any issues with regards to the husband's language skills or his ability to establish himself economically in Canada. However, it was the Applicant herself who offered her husband as a solution to the concerns raised in the Fairness Letter. It was not procedurally unfair for the Officer to explain why the solution offered by the Applicant did not satisfy the concerns in the Fairness Letter.

[73] In my view, the comment by the previous officer GP0098 — "The question is, why wait to register for IELTS now? This is simply not credible, considering her intent of wanting to pursue a PhD level once in Canada" — is not material to the final decision on Negative Substituted Evaluation which, in so far as the Applicant's language abilities are concerned, is based upon "no new IELTS result submitted" and "it is unlikely that PA will be able to secure skilled employment with such a low proficiency in reading English." The Officer notes that "PA states has continued English studies with a private tutor…" There is no indication that this is not believed by the Officer who makes the final Decision.

[74] The Applicant further complains that she also "indicated a willingness to officially demonstrate her improvement by signing up for an official language test if given the appropriate

amount of time to do so." As noted, I see no request for a formal extension of time; the Applicant asserts her improved efficiency and supports this with a letter from her tutor.

Unreasonableness

[75] The Applicant says that the Officer failed to consider her on-going language training. As indicated above, the Officer refers to and considers the Applicant's submissions on her efforts to improve her English by taking further training. The decision is based upon the fact that no new IELTS scores are submitted. In my view, there is nothing unreasonable in the Officer requiring the usual proof of language efficiency, and the Applicant did not formally ask for further time to take the test and submit new scores.

[76] The Applicant also says that the Officer failed to consider her adaptability. The Applicant's basic response to the concerns and the Fairness Letter was not to dispute the initial assessment that she would not, at the time of her application, be able to achieve economic self-sufficiency in Canada as a University Professor, notwithstanding that she had scored 70 points. Her approach was to point out why she was not in such a position, and to suggest that the deficiencies could be remedied if she was allowed to come to Canada and take further education. There is no suggestion that she lacked the financial and family support to engage in the further education and experience required to achieve her goals.

[77] This brings up the issue of the relationship between the point system and economic self-sufficiency. The Applicant says that, in order to meet the requirements necessary to come to Canada pursuant to the skilled worker class, she must meet the points requirements set out in paragraph 85(3)(b) of the Regulations and demonstrate that she can become economically established in

Canada. That is, that she can become economically self-sufficient within a reasonable amount of time upon her arrival in Canada. Given that the Applicant has already surpassed the points requirement by three points in this case, she says that the only issue is whether or not there is an additional requirement that she be able to establish herself economically in the occupation in which she qualified.

[78] It is clear that both the Act and the Regulations state that the Applicant must have the ability to become economically established in Canada in order to meet the requirements to enter Canada as a skilled worker. Under the heading "Economic Migration", subsection 12(2) of the Act indicates that:

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

[79] Section 75 of the Regulations specifically addresses the skilled worker class:

75. (1) For the purposes of subsection 12(2) of the Act, the federal skilled worker class is hereby prescribed as a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada and who intend to reside in a province other than the Province of Quebec.	**75.** (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des travailleurs qualifiés (fédéral) est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada, qui sont des travailleurs qualifiés et qui cherchent à s'établir dans une province autre que le Québec.

[80] Hence, I have to agree with the Applicant that neither the Act nor the Regulations specify that an individual must become economically established in the occupational category that allows them to qualify as a skilled worker, or as the Officer appears to have assumed in this case that, even if the Applicant could not immediately become a University Professor, she was still obliged to demonstrate immediate economic self-sufficiency as a "skilled worker."

[81] Parliament appears to have conceived of a skilled worker differently, for example, from an individual who applies pursuant to the entrepreneurship class who must demonstrate that they meet the requirements of the class for a period of one year within a three-year period after the day on which they become a permanent resident in Canada. As the Applicant points out, the Act and Regulations set out specific reporting requirements in this regard. In contrast, there appear to be no requirements that a skilled worker applicant has to meet upon their arrival in Canada and there is nothing which says they must immediately demonstrate economic self-sufficiency by only engaging in skilled work.

[82] I also agree with the Applicant that the Court has not found the legislation to contain a requirement that the person become economically self-sufficient in their qualifying occupation, or that a person has to join and participate in the labor market in a particular occupation when they arrive in Canada. The Court appears to have interpreted the legislative requirements to mean that the person has only to demonstrate that they will be able to become economically self-sufficient in Canada. See *Roohi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1408 at paragraph 28; *Uddin v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1005 at paragraphs 19, 25.

[83] Finally, the Applicant says that the Decision is unreasonable because the Officer placed too much emphasis on a lack of Western experience. In this regard the Applicant refers to the words of Justice Evans in *Dogra*, above, at paragraphs 27 to 30.

[84] In my view, the Officer does not base his Decision upon a lack of "Western experiences. " There is no assessing of the Canadian relevance of the Applicant's education or the equivalence of the Applicant's overseas qualifications. As Justice Evans points out in *Dogra* "immigration policy is placing increasing emphasis on Applicants' adaptability and flexibility" and this is what the Officer is looking at. The Applicant has limited international experience, limited work experience, no demonstrated proficiency in English, and lacks a PhD. She presently lacks the basic prerequisites for an academic posting in Canada. It is the whole picture that was assessed and there was no undue emphasis on the lack of Western or global experience. Without a proficiency in English and a PhD (neither of which the Applicant questions as a necessary qualification) she is unlikely to secure a post as a university professor in Canada. The Applicant even concedes this point by asserting that she will remedy these basic deficiencies, and it cannot be said that the Officer's consideration of them was unreasonable.

CONCLUSIONS

[85] While I do not accept all of the grounds for reviewable error raised by the Applicant, it seems to me that the Decision is unreasonable and falls outside of the *Dunsmuir* range because the Officer has assumed that the Applicant was obliged to demonstrate immediate economic self-sufficiency either as a University Professor, or at least as a skilled worker, and failed to take into account the brother's offer and guarantee of economic support until the Applicant and her husband had achieved their professional goals. For this reason, the matter requires reconsideration.

[86] Neither party has proposed a question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different officer.
2. There is no question for certification.

"James W. Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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