

**Date: 20090226**

**Docket: IMM-3310-08**

**Citation: 2009 FC 207**

**Ottawa, Ontario, February 26, 2009**

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

**BETWEEN:**

**VIKAS**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**O'KEEFE J.**

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), for judicial review of the decision of a visa officer at the Canadian Consulate General in Detroit (the officer) dated May 20, 2008, wherein the officer denied the applicant for permanent residence as a member of the economic class.

[2] The applicant requests the following relief:

1. An order for a writ of *certiorari* quashing the decision;
2. An order for a writ of *mandamus* directing that:
  - a. The respondent reassess the application at a different visa office and/or by a different visa officer;
  - b. In the event that the respondent develops concerns about the application, that they should apprise the applicant of their concerns and provide an opportunity to address them;
  - c. That costs on a solicitor and client scale be granted; and
  - d. Such other relief as the Court may deem just and equitable.

### **Background**

[3] Vikas (his only name) filed an application for permanent residence as a skilled worker through the Consulate in Buffalo, New York on or about July 31, 2006. He listed the occupations of cashier supervisor (NOC 6211), retail store supervisor-retail (NOC 6211) and/or supervisor-retail (NOC 6211) in his application.

[4] The respondent requested information via letter in the summer of 2007. The letter was sent to the wrong address and resent in November of that year.

[5] The applicant attended a two-part interview in Detroit on April 30, 2008. The first part was conducted by H. Roznawski and the latter part by the officer, Ms. J. Stoneberg who made the final decision on this file. The applicant's educational background and work experience were discussed.

[6] At the interview, the applicant provided information about his employers, responsibilities and hours worked. The officer confirmed with him that while he was employed with MIRC Electronics Ltd. (MIRC), he worked 30 hours per week from January 2001 to December 2004 and then 40 hours per week from January 2005 to August 2005. At the end of the interview, the officer performed a calculation on paper, without explaining exactly what she was doing or making any further comment. The applicant understood this silence to mean that she was satisfied that he had sufficient hours and the interview ended there. He states that the officer never told him that she would be awarding him only 19 points for his work experience. The applicant was asked to provide further details with respect to his employment at MIRC and provided with two weeks to provide further documentation.

### **Officer's Decision**

[7] In her decision dated May 20, 2008, the officer determined that the applicant did not meet the requirements for immigration to Canada as a member of the economic class, skilled worker. The officer informed the applicant that pursuant to subsection 76(1) of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the Regulations), skilled worker applicants are assessed based on certain selection criteria.

[8] The applicant received 66 points in total whereas 67 is the minimum required. The applicant received no points for arranged employment or adaptability and 12 of a possible 24 for language, but has not raised any issue with respect to these conclusions. The applicant received 19 out of a possible 21 points for experience and this is the finding that is being challenged.

[9] The officer accepted that the applicant met the requirements to be assessed under NOC 6211 retail trade supervisor through his experience working at MIRC. The reason he received only 19 points was that he did not satisfy the minimum number of months of work experience (48 months) required to receive 21 points. The officer calculated his work experience as follows:

4 years x 52 weeks x 30 hours/week = 3.2 years of work experience

3.2 years + 8 months full-time work = 46.4 months of work experience

### **Issue**

[10] Did the officer breach her duty of fairness by failing to alert the applicant to her concerns as to the number of points that she intended to award him for his work experience?

### **Applicant's Submissions**

[11] The applicant states that he was surprised that the application was refused because the applicant was 1.6 months short of the minimum experience required for 21 points since he was not informed of the officer's concerns during the interview or thereafter or that he would be receiving

only 66 points in total. He was also not provided with the chance to respond. This is a breach of the duty of fairness.

[12] An officer must provide an applicant with the opportunity to respond to any concerns before a negative assessment is rendered. If the officer breaches the duty of fairness, the decision is quashed and remitted to a different visa officer.

[13] For example, in *Muliadi v. Canada (Minister of Employment and Immigration)*, [1986] 2 F.C. 205, the application was dismissed largely due to information received from provincial authorities. The applicant was not given a chance to respond to the concerns of the officer who was found to have breached the duty of fairness.

[14] Other cases, including *Fong v. Canada (Minister of Employment and Immigration)*, [1990] F.C.J. No. 641 and *Yang v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 218, have concluded that the officer must ask appropriate questions to address any concerns that an application is deficient.

[15] There is no good reason why the officer could not have alerted the applicant to her concerns. Furthermore, because he was not informed, she denied the applicant the opportunity to request that she exercise her discretion positively pursuant to subsection 76(3) of the Regulations to accept the applicant even if he was missing one point.

[16] The applicant submits that he is the ideal candidate for Canada. He is well educated, and had lived in Canada for almost two and a half years at the time of the interview, having studied for almost two years and worked for almost one year in this country. Any reasonable person would conclude that he could successfully establish himself economically here and the point total of 66 is not an accurate indicator. This case cries out for substituted evaluation as the only reason the applicant was refused is that he was 1.6 months short of work experience.

[17] The applicant further submits that the officer must assess the applicant's experience and time spent to award units of assessment for experience. In this case, the officer failed in doing so.

### **Respondent's Submissions**

[18] First, the officer was not under any obligation to provide the applicant with a "running score" at each step or to stress all of her concerns which arose directly from the Act and Regulations that bind the officer's assessment: *Abanzukwe v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1181 at paragraph 11; *Ali v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 468 at paragraphs 18 to 21; *Ashghar v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1091 at paragraph 21. The cases cited by the applicant are not applicable because they relate to concerns arising from extrinsic evidence, rather than the Act and Regulations.

[19] Second, the applicant was given an opportunity to provide additional documents as he was given two weeks to submit further information after the interview.

[20] The applicant could, as most applicants do, have requested a substituted evaluation at any time prior to a decision being made. The applicant is presumed to know the law and was represented by experienced counsel.

### **Applicant's Reply**

[21] Though the officer is not obligated to provide a “running score”, the unique circumstances of this case required that the applicant be alerted to the officer’s concerns.

[22] Furthermore, the applicant submits, *Muliadi* above, is not restricted to the issue of third party or extrinsic evidence: see for example *Dhaliwal v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 122 and *Fong* above.

[23] Also, the fact that the applicant was invited to provide further information about his employment at MIRC is irrelevant since the CAIPs notes from after the interview show that the officer was satisfied the applicant was employed there in his intended occupation and the applicant had already informed her of the hours he worked there.

[24] Finally, the Act and Regulations seek to attract skilled workers who are able to establish themselves economically in Canada. The applicant would clearly have little trouble in doing so.

### **Analysis and Decision**

[25] **Issue**

Did the officer breach her duty of fairness by failing to alert the applicant to her concerns as to the number of points that she intended to award him for his work experience?

The applicant in the present case was one point short of the required 67 points needed for his application to be successful.

[26] As noted earlier, the officer part way through the interview informed the applicant that she wanted to determine whether he had enough hours. She then proceeded to perform some type of calculation in the presence of the applicant. After she finished the calculation, she continued the interview.

[27] Apparently, the officer concluded from her calculation that the applicant did not have sufficient work experience to qualify for the 21 points. The officer did not tell the applicant the result of her calculation.

[28] The issue now becomes whether the officer's failure to notify the applicant of the result of her calculation amounts to a breach of the duty of procedural fairness.



[29] I agree with the respondent that an officer is not required to give an applicant a running score at each step of the interview. However, I am of the view that the facts of the present case are unique. It was not unreasonable for the applicant to assume that the results of the officer's calculation were favourable to him when she did not tell him the results were not in his favour.

[30] I am of the opinion that the failure of the officer to tell the applicant of the negative result of her calculations, on the unique facts of this case, resulted in a breach of the duty of procedural fairness.

[31] Since I have found a breach of the duty of procedural fairness, I must set the officer's decision aside.

[32] The decision of the officer is therefore set aside and the matter is referred to a different officer for redetermination.

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

**JUDGMENT**

[34] **IT IS ORDERED that** the application for judicial review is allowed, the decision of the officer is set aside and the matter is referred to a different officer for redetermination.

“John A. O’Keefe”

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Judge

## ANNEX

**Relevant Statutory Provisions**

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Regulations*, SOR/2002-227:

<p>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:</p> <p>(a) the skilled worker must be awarded not less than the minimum number of required points referred to in subsection</p> <p>(2) on the basis of the following factors, namely,</p> <p>(i) education, in accordance with section 78,</p> <p>(ii) proficiency in the official languages of Canada, in accordance with section 79,</p> <p>(iii) experience, in accordance with section 80,</p> <p>(iv) age, in accordance with section 81,</p> <p>(v) arranged employment, in accordance with section 82, and</p>	<p>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) :</p> <p>a) le travailleur qualifié accumule le nombre minimum de points visé au paragraphe</p> <p>(2), au titre des facteurs suivants :</p> <p>(i) les études, aux termes de l'article 78,</p> <p>(ii) la compétence dans les langues officielles du Canada, aux termes de l'article 79,</p> <p>(iii) l'expérience, aux termes de l'article 80,</p> <p>(iv) l'âge, aux termes de l'article 81,</p> <p>(v) l'exercice d'un emploi réservé, aux termes de l'article 82,</p>
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| (vi) adaptability, in accordance with section 83; and  | (vi) la capacité d'adaptation, aux termes de l'article 83;  |
| (b) the skilled worker must  | b) le travailleur qualifié :  |
| (i) have in the form of transferable and available funds, unencumbered by debts or other obligations, an amount equal to half the minimum necessary income applicable in respect of the group of persons consisting of the skilled worker and their family members, or | (i) soit dispose de fonds transférables — non grevés de dettes ou d'autres obligations financières — d'un montant égal à la moitié du revenu vital minimum qui lui permettrait de subvenir à ses propres besoins et à ceux des membres de sa famille, |
| (ii) be awarded the number of points referred to in subsection 82(2) for arranged employment in Canada within the meaning of subsection 82(1).   | (ii) soit s'est vu attribuer le nombre de points prévu au paragraphe 82(2) pour un emploi réservé au Canada au sens du paragraphe 82(1).  |
| (2) The Minister shall fix and make available to the public the minimum number of points required of a skilled worker, on the basis of   | (2) Le ministre établit le nombre minimum de points que doit obtenir le travailleur qualifié en se fondant sur les éléments ci-après et en informe le public :  |
| (a) the number of applications by skilled workers as members of the federal skilled worker class currently being processed;  | a) le nombre de demandes, au titre de la catégorie des travailleurs qualifiés (fédéral), déjà en cours de traitement;   |
| (b) the number of skilled workers projected to become permanent residents according to the report to Parliament referred to in section 94 of the Act; and  | b) le nombre de travailleurs qualifiés qui devraient devenir résidents permanents selon le rapport présenté au Parlement conformément à l'article 94 de la Loi;   |
| (c) the potential, taking into account economic and other relevant factors, for the establishment of skilled   | c) les perspectives d'établissement des travailleurs qualifiés au Canada, compte tenu des facteurs économiques  |

workers in Canada.

(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.

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

80.(1) Up to a maximum of 21 points shall be awarded to a skilled worker for full-time work experience, or the full-time equivalent for part-time work experience, within the 10 years preceding the date of their application, as follows:

(a) for one year of work experience, 15 points;

(b) for two years of work experience, 17 points;

(c) for three years of work experience, 19 points; and

et autres facteurs pertinents.

(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).

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

80.(1) Un maximum de 21 points d'appréciation sont attribués au travailleur qualifié en fonction du nombre d'années d'expérience de travail à temps plein, ou l'équivalent temps plein du nombre d'années d'expérience de travail à temps partiel, au cours des dix années qui ont précédé la date de présentation de la demande, selon la grille suivante :

a) pour une année de travail, 15 points;

b) pour deux années de travail, 17 points;

c) pour trois années de travail, 19 points;

(d) for four or more years of work experience, 21 points.

d) pour quatre années de travail, 21 points.

(2) For the purposes of subsection (1), points are awarded for work experience in occupations, other than a restricted occupation, that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the National Occupational Classification matrix.

(2) Pour l'application du paragraphe (1), des points sont attribués au travailleur qualifié à l'égard de l'expérience de travail dans toute profession ou tout métier appartenant aux genre de compétence 0 Gestion ou niveaux de compétences A ou B de la matrice de la Classification nationale des professions — exception faite des professions d'accès limité.

(3) For the purposes of subsection (1), a skilled worker is considered to have experience in an occupation, regardless of whether they meet the occupation's employment requirements of the occupation as set out in the occupational descriptions of the National Occupational Classification, if they performed

(3) Pour l'application du paragraphe (1), le travailleur qualifié, indépendamment du fait qu'il satisfait ou non aux conditions d'accès établies à l'égard d'une profession ou d'un métier dans la Classification nationale des professions est considéré comme ayant acquis de l'expérience dans la profession ou le métier :

(a) the actions described in the lead statement for the occupation as set out in the National Occupational Classification; and

a) s'il a accompli l'ensemble des tâches figurant dans l'énoncé principal établi pour la profession ou le métier dans les descriptions des professions de cette classification;

(b) at least a substantial number of the main duties of the occupation as set out in the occupational descriptions of the National Occupational Classification, including all the essential duties.

b) s'il a exercé une partie appréciable des fonctions principales de la profession ou du métier figurant dans les descriptions des professions de cette classification, notamment toutes les fonctions essentielles.

- (4) A period of work experience that exceeds full-time work in one occupation, or simultaneous periods of work experience in more than one full-time occupation, shall be evaluated as a single period of full-time work experience in a single occupation.
- (4) Les heures supplémentaires effectuées dans le cadre d'un emploi à temps plein sont sans effet sur le calcul de l'expérience acquise dans cet emploi, non plus que le fait d'occuper simultanément plusieurs emplois à temps plein.
- (5) A skilled worker must specify in their application for a permanent resident visa the four-digit code of the National Occupational Classification that corresponds to each of the occupations engaged in by the applicant and that constitutes the skilled worker's work experience.
- (5) Le travailleur qualifié indique dans sa demande de visa de résident permanent, à l'aide du code à quatre chiffres de la Classification nationale des professions, toutes les professions qu'il a exercées et qui correspondent à son expérience de travail.
- (6) An officer is not required to consider occupations that have not been specified in the application.
- (6) L'agent n'a pas à tenir compte des professions qui ne sont pas mentionnées dans la demande.
- (7) For the purposes of this section, full-time work is equivalent to at least 37.5 hours of work per week.
- (7) Pour l'application du présent article, le travail à temps plein équivaut à au moins trente-sept heures et demie de travail par semaine.

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

**DOCKET:** IMM-3310-08

**STYLE OF CAUSE:** VIKAS

- and -

THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** January 22, 2009

**REASONS FOR JUDGMENT  
AND JUDGMENT OF:** O'KEEFE J.

**DATED:** February 26, 2009

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