

**Date: 20090408**

**Docket: IMM-3798-08**

**Citation: 2009 FC 355**

**Ottawa, Ontario, April 8, 2009**

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

**BETWEEN:**

**PATRICK LESLIE HEALEY**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT**

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of a Designated Immigration Officer (Officer) of the Canadian High Commission in London, United Kingdom, dated June 24, 2008 (Decision), refusing the Applicant's application for permanent residence in Canada under the federal skilled worker category.

## **BACKGROUND**

[2] The Applicant is a citizen of the United Kingdom. At the time of his application he was 48 years old and married with two children. The Applicant has no French speaking ability.

[3] The Applicant attended six years of elementary school, five years of secondary school and then attended Thurrock Business College between April 1981 and March 1982, where he received his CPC Management certificate, and Harlow College between June 1997 and June 1998, where he obtained a certificate in B TEC Management. Between June 2003 and June 2004, he attended Basildon and Thurrock College, where he received a certificate in Carpentry. Since March 2004, the Applicant has been employed by Trinity Construction Services.

[4] There was an error made on the Applicant's application in that two years of college were not accurately indicated in the educational history boxes on the application form. The Applicant accidentally wrote "0" instead of "2" in the box labelled "University/College."

[5] On June 29, 2008, Applicant's previous counsel contacted the London CHC and requested a reconsideration of the negative decision, particularly the award of only 15 points for education. The Applicant felt that 15 years of full-time study, in conjunction with his two-year certificate, entitled him to enough points for a successful application. On June 30, 2008, the Officer replied and stated that the college certificates had been reviewed, but since the Applicant had completed only 13 years of education, 15 points were appropriate. On July 2, 2008, counsel again wrote to the London CHC

to clarify the mistake in the form but received no response. He again wrote on August 15, 2008 and again received no response.

## **DECISION UNDER REVIEW**

[6] The Officer concluded that the Applicant did not meet the requirements for immigration to Canada. He relied upon subsection 12(2) of the Act (which states that 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) and subsection 75(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations) (which prescribes that the federal skilled worker class is a class of persons who may become permanent residents on the basis of their ability to become economically established in Canada).

[7] The Officer assessed the Applicant based on the minimum requirements set out in subsection 75(2) of the Regulations and the criteria set out in subsection 76(1). The criteria included age, education, knowledge of Canada's official languages, experience, arranged employment and adaptability. The pass mark is 67 points.

[8] The Officer decided that the Applicant had not obtained sufficient points for a permanent residence visa as a member of the federal skilled worker class. The following were the points given to the Applicant:

	<u>Points Assessed</u>	<u>Maximum Possible</u>
Age	10	10
Experience	21	21
Arranged Employment	0	10
Education	15	25
Official Language Proficiency	16	24
Adaptability	3	10
-----		
Total	65	100

[9] The Officer concluded that the Applicant had not obtained sufficient points to satisfy him that the Applicant could become economically established in Canada. The Officer highlighted subsection 76(3) of the Regulations which permits an officer to substitute his/her evaluation of the likelihood of an applicant becoming economically established in Canada if the number of points awarded is not a sufficient indicator. Subsection 76(4) of the Regulations requires the concurrence of a second officer. The Officer considered the Applicant's case under these subsections and concluded that the points awarded were an accurate reflection of the likelihood of the Applicant's ability to become economically established in Canada. Therefore, his application was not forwarded to the program manager for consideration.

## ISSUES

[10] The Applicant raises the following issues on this application:

- 1) Did the Officer properly consider the evidence?
- 2) Was the Applicant provided with sufficient reasons?
- 3) Did the Officer properly consider the request for substituted evaluation?

## STATUTORY PROVISIONS

[11] The following section of the Act is applicable:

### **Economic immigration**

**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.

### **Immigration économique**

**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.

[12] The following provisions of the Regulations are also applicable to these proceedings:

73. The following definitions apply in this Division, other than section 87.1.

"educational credential"  
*Diplôme*

'educational credential" means any diploma, degree or trade or apprenticeship credential

73. Les définitions qui suivent s'appliquent à la présente section, à l'exception de l'article 87.1.

«ancien règlement»  
*former Regulations*

«ancien règlement» S'entend au sens du paragraphe 316(1).  
«diplôme»

issued on the completion of a program of study or training at an educational or training institution recognized by the authorities responsible for registering, accrediting, supervising and regulating such institutions in the country of issue.

*"former Regulations"*  
*ancien règlement*

'former Regulations" has the same meaning as in subsection 316(1).

*"restricted occupation"*  
*profession d'accès limité*

*educational credential*  
«diplôme» Tout diplôme, certificat de compétence ou certificat d'apprentissage obtenu conséquemment à la réussite d'un programme d'études ou d'un cours de formation offert par un établissement d'enseignement ou de formation reconnu par les autorités chargées d'enregistrer, d'accréditer, de superviser et de réglementer les établissements d'enseignement dans le pays de délivrance de ce diplôme ou certificat.

*«profession d'accès limité»*  
*restricted occupation*

'restricted occupation" means an occupation designated as a restricted occupation by the Minister, taking into account labour market activity on both an area and a national basis, following consultation with the Department of Human Resources Development, provincial governments and any other relevant organizations or institutions.

«profession d'accès limité»  
Toute profession désignée comme telle par le ministre en fonction de l'activité sur le marché du travail aux niveaux national et régional, après consultation du ministère du Développement des ressources humaines, des gouvernements provinciaux et de toute autre organisation ou institution compétente.

...

...

**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

**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

basis of their ability to become economically established in Canada and who intend to reside in a province other than the Province of Quebec.

### **Skilled workers**

(2) A foreign national is a skilled worker if

(a) within the 10 years preceding the date of their application for a permanent resident visa, they have at least one year of continuous full-time employment experience, as described in subsection 80(7), or the equivalent in continuous part-time employment in one or more 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;

(b) during that period of employment they performed the actions described in the lead statement for the occupation as set out in the occupational descriptions of the *National Occupational Classification*; and

(c) during that period of employment they performed a substantial number of the main

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.

### **Qualité**

(2) Est un travailleur qualifié l'étranger qui satisfait aux exigences suivantes :

a) il a accumulé au moins une année continue d'expérience de travail à temps plein au sens du paragraphe 80(7), ou l'équivalent s'il travaille à temps partiel de façon continue, au cours des dix années qui ont précédé la date de présentation de la demande de visa de résident permanent, dans au moins une des professions appartenant au 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;

b) pendant cette période d'emploi, il a accompli l'ensemble des tâches figurant dans l'énoncé principal établi pour la profession dans les descriptions des professions de cette classification;

c) pendant cette période d'emploi, il a exercé une partie appréciable des fonctions

duties of the occupation as set out in the occupational descriptions of the *National Occupational Classification*, including all of the essential duties.

principales de la profession figurant dans les descriptions des professions de cette classification, notamment toutes les fonctions essentielles.

### **Minimal requirements**

### **Exigences**

(3) If the foreign national fails to meet the requirements of subsection (2), the application for a permanent resident visa shall be refused and no further assessment is required.

(3) Si l'étranger ne satisfait pas aux exigences prévues au paragraphe (2), l'agent met fin à l'examen de la demande de visa de résident permanent et la refuse.

### **Selection Criteria**

### **Critères de sélection**

**76.** (1) For the purpose of determining whether a skilled worker, as a member of the federal skilled worker class, will be able to become economically established in Canada, they must be assessed on the basis of the following criteria:

**76.** (1) Les critères ci-après indiquent que le travailleur qualifié peut réussir son établissement économique au Canada à titre de membre de la catégorie des travailleurs qualifiés (fédéral) :

(a) the skilled worker must be awarded not less than the minimum number of required points referred to in subsection (2) on the basis of the following factors, namely,

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

(i) education, in accordance with section 78,

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

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

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

(iii) experience, in accordance with section 80,

(iii) l'expérience, aux termes de l'article 80,



(iv) age, in accordance with section 81,

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

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

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

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

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

(b) the skilled worker must

b) le travailleur qualifié :

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

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

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

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

### **Number of points**

### **Nombre de points**

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

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

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

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

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

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

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

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

**Circumstances for officer's substituted evaluation**

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

(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.

(3) Si le nombre de points obtenu par un travailleur qualifié — que celui-ci obtienne ou non le nombre minimum de points visé au paragraphe (2) — ne reflète pas l'aptitude de ce travailleur qualifié à réussir son établissement économique au Canada, l'agent peut substituer son appréciation aux critères prévus à l'alinéa (1)a).

**Concurrence**

**Confirmation**

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

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

...

...

78. (1) The definitions in this subsection apply in this section.

"full-time"  
*temps plein*

'full-time" means, in relation to a program of study leading to an educational credential, at least 15 hours of instruction per week during the academic year, including any period of training in the workplace that forms part of the course of instruction.

"full-time equivalent"  
*équivalent temps plein*

'full-time equivalent" means, in respect of part-time or accelerated studies, the period that would have been required to complete those studies on a full-time basis.

78. (3) For the purposes of subsection (2), points

(a) shall not be awarded cumulatively on the basis of more than one single educational credential; and

(b) shall be awarded

78. 1) Les définitions qui suivent s'appliquent au présent article.

«équivalent temps plein»  
*full-time equivalent*

«équivalent temps plein» Par rapport à tel nombre d'années d'études à temps plein, le nombre d'années d'études à temps partiel ou d'études accélérées qui auraient été nécessaires pour compléter des études équivalentes.

«temps plein»  
*full-time*

«temps plein» À l'égard d'un programme d'études qui conduit à l'obtention d'un diplôme, correspond à quinze heures de cours par semaine pendant l'année scolaire, et comprend toute période de formation donnée en milieu de travail et faisant partie du programme.

78. 3) Pour l'application du paragraphe (2), les points sont accumulés de la façon suivante :

a) ils ne peuvent être additionnés les uns aux autres du fait que le travailleur qualifié possède plus d'un diplôme;

b) ils sont attribués :

(i) for the purposes of paragraphs (2)(a) to (d), subparagraph (2)(e)(i) and paragraph (2)(f), on the basis of the single educational credential that results in the highest number of points, and

(ii) for the purposes of subparagraph (2)(e)(ii), on the basis of the combined educational credentials referred to in that paragraph.

#### Special circumstances

(4) For the purposes of subsection (2), if a skilled worker has an educational credential referred to in paragraph (2)(b), subparagraph (2)(c)(i) or (ii), (d)(i) or (ii) or (e)(i) or (ii) or paragraph (2)(f), but not the total number of years of full-time or full-time equivalent studies required by that paragraph or subparagraph, the skilled worker shall be awarded the same number of points as the number of years of completed full-time or full-time equivalent studies set out in the paragraph or subparagraph.

(i) pour l'application des alinéas (2)a) à d), du sous-alinéa (2)e)(i) et de l'alinéa (2)f), en fonction du diplôme qui procure le plus de points selon la grille,

(ii) pour l'application du sous-alinéa (2)e)(ii), en fonction de l'ensemble des diplômes visés à ce sous-alinéa.

#### Circonstances spéciales

(4) Pour l'application du paragraphe (2), si le travailleur qualifié est titulaire d'un diplôme visé à l'un des alinéas (2)b), des sous-alinéas (2)c)(i) et (ii), (2)d)(i) et (ii) et (2)e)(i) et (ii) ou à l'alinéa (2)f) mais n'a pas accumulé le nombre d'années d'études à temps plein ou l'équivalent temps plein exigé par l'un de ces alinéas ou sous-alinéas, il obtient le nombre de points correspondant au nombre d'années d'études à temps plein — ou leur équivalent temps plein — mentionné dans ces dispositions.

[13] The Applicant submits that the determination of points in the education category are governed by section 78 (2) of the Regulations:

(2) A maximum of 25 points shall be awarded for a skilled

(2) Un maximum de 25 points d'appréciation sont attribués

worker's education as follows:	pour les études du travailleur qualifié selon la grille suivante :
(a) 5 points for a secondary school educational credential;	a) 5 points, s'il a obtenu un diplôme d'études secondaires;
(b) 12 points for a one-year post-secondary educational credential, other than a university educational credential, and a total of at least 12 years of completed full-time or full-time equivalent studies;	b) 12 points, s'il a obtenu un diplôme postsecondaire — autre qu'un diplôme universitaire — nécessitant une année d'études et a accumulé un total d'au moins douze années d'études à temps plein complètes ou l'équivalent temps plein;
(c) 15 points for	c) 15 points, si, selon le cas :
(i) a one-year post-secondary educational credential, other than a university educational credential, and a total of at least 13 years of completed full-time or full-time equivalent studies, or	(i) il a obtenu un diplôme postsecondaire — autre qu'un diplôme universitaire — 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	(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

equivalent studies, or	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;
(e) 22 points for	e) 22 points, si, selon le cas :
(i) a three-year post-secondary educational credential, other than a university educational credential, and a total of at least 15 years of completed full-time or full-time equivalent studies, or	(i) il a obtenu un diplôme postsecondaire — autre qu'un diplôme universitaire — nécessitant trois années d'études à temps plein et a accumulé un total de quinze années d'études à temps plein complètes ou l'équivalent temps plein,
(ii) two or more university educational credentials at the bachelor's level and a total of at least 15 years of completed full-time or full-time equivalent studies; and	(ii) il a obtenu au moins deux diplômes universitaires de premier cycle et a accumulé un total d'au moins quinze années d'études à temps plein complètes ou l'équivalent temps plein;
(f) 25 points for a university educational credential at the master's or doctoral level and a total of at least 17 years of completed full-time or full-time equivalent studies.	f) 25 points, s'il a obtenu un diplôme universitaire de deuxième ou de troisième cycle et a accumulé un total d'au moins dix-sept années d'études à temps plein complètes ou l'équivalent temps plein.

## STANDARD OF REVIEW

[14] The evidentiary issue (issue 1) and the consideration of the substituted evaluation (issue 3), have attracted significant deference, as outlined in *Silva v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 981 (F.C.) at paragraph 7:

I adopt the view that the particular expertise of Visa Officers dictates a deferential approach when reviewing such a decision. The assessment of an applicant for permanent residence under the Federal Skilled Worker Class and a “substituted evaluation” under subsection 76(3) are discretionary decisions involving factual findings that should be given a high degree of deference. Such decisions should be reviewed on the standard of patent unreasonableness.

[15] Adequate reasons (issue 2) is a procedural fairness issue in which the standard of review is correctness: *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1.

[16] In *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*), the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, “the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review”: *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of “reasonableness” review.

[17] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the 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.

[18] In light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to issues 1 and 3 raised by the Applicant to be reasonableness. 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": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene 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."

## **ARGUMENTS**

### **The Applicant**

#### **The Officer did not Consider the Evidence Properly**



[19] The Applicant submits that he provided evidence for all of his educational experience. He says that paragraph 78(2)(d)(i) of the Regulations clearly applies to his education history, so he should be entitled to 20 points. This means that the Officer erred in awarding him only 15 points.

### **The Applicant was not Provided with Sufficient Reasons**

[20] The Applicant submits that the duty to provide reasons for administrative decisions has been increasingly enforced. The Applicant relies upon *Via Rail Canada v. National Transportation Agency*, [2001] 2 F.C. 25 (F.C.A.) (*Via*) at paragraphs 21-22:

...adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A., “[a]ny attempt to formulate a standard of adequacy that must be met before a tribunal can be said to have discharged its duty to give reasons must [page36] ultimately reflect the purposes served by a duty to give reasons.”

The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.

[21] The Applicant submits that he has the right not only to be heard, by adducing evidence in the original application, but also to respond to the concerns of the decision maker: *Lu v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 124 (F.C.T.D.) and *Mittal (Litigation Guardian of) v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 727 (F.C.T.D.).

[22] He says that in the case of an application for permanent residence under the federal skilled worker category, the “purposes served by a duty to give reasons” includes the ability of an applicant to assess his or her chances of future success upon a subsequent application: *Via* at para. 21. The CHC London made specific reference to the possibility of future applications in its June 30, 2008 letter. *Via* goes on to state at paragraph 19 that “reasons allow the parties to effectuate any right of appeal or judicial review that they might have. They provide a basis for an assessment of possible grounds for appeal or review.”

[23] The Applicant submits that the reasons in the present case are deficient because they do not indicate how the Officer reached his conclusion. The Officer’s evaluation was inadequate and the Decision cannot withstand a probing scrutiny. The Applicant relies upon *Adu v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 693 (F.C.) at paragraphs 10 and 11:

In *Baker*, the Supreme Court of Canada noted that in certain circumstances, the duty of procedural fairness requires the provisions of written reasons for a decision. This is especially so where, as in this case, the decision has important ramifications for the individual or individuals in question. According to the Court, “It would be unfair if the person subject to a decision such as this one which is so critical to their future not be told why the result was reached”. (at para. 43).

The importance of providing 'reasoned reasons' was reiterated by the Supreme Court three years later in *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26, where the Court noted that unsuccessful litigants should not be left in any doubt as to why he or she was not successful. Although *Sheppard* was a criminal case, the reasoning in that case has been applied in the administrative law context generally, and in the immigration context in particular, in cases such as *Harkat (Re)*, [2005] F.C.J. No. 481, *Mahy v. Canada*, [2004] F.C.J. No. 1677, *Jiang v. Canada (Minister of Citizenship and*

*Immigration*), [2005] F.C.J. No. 597 and *Ahmed v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1415.

[24] The Applicant goes on to cite *Ogunfowora v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 637 (F.C.) (*Ogunfowora*) at paragraph 58:

The standard for sufficiency of reasons was outlined in *Mendoza v. Canada (M.C.I.)*, [2004] F.C.J. No. 846, 2004 FC 687 at paragraph 4, relying on the decision of the Federal Court of Appeal in *Mehertian v. Canada (M.E.I.)*, [1992] F.C.J. No. 545 (F.C.A.)(QL). The Court stated that reasons are required to be sufficiently clear, precise and intelligible so that a claimant may know why his or her claim has failed and be able to decide whether to seek leave for judicial review. Furthermore, on the authority of *Hussain v. Canada (Minister of Employment and Immigration)* (1994), 174 N.R. 76 at paragraph 3 (F.C.A.), another decision of the Federal Court of Appeal in the immigration context, if the reasons for decision given by the Board are so inadequate that they fail to provide a clear basis for the reasoning behind its decision, the decision will be quashed. Finally, in *Chen v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 783, 2001 FCT 500, it was held that a panel must clearly express itself on primary issues arising from a claim and that a failure to do so will result in its decision being set aside.

[25] In *Ogunfowora*, the Court found that CAIPS notes can constitute sufficient reasons, but only if they provide sufficient details for the person involved to know the reason why the application was denied. The Court allowed the judicial review application in that case because, although the CAIPS notes stated the basis for the decision, they did not provide in sufficient detail any analysis as to why the officer held that the applicants would not return to Nigeria at the end of their authorized stay. Likewise, in the case at bar, the Applicant says that the reasons and CAIPS notes did not provide in sufficient detail any analysis of why the Officer held that he did not qualify for an award of 20 points in the education category.

### **Application to the Facts**

[26] On the presumption that the Officer had not accepted the Applicant's educational credentials, previous counsel attempted to clarify the situation. However, with no information as to what the Officer had found objectionable or inadequate, previous counsel was reduced to guesswork. He therefore reiterated the validity of the Applicant's City and Guilds certificates.

[27] The response of the London CHC provided less information than the original rejection letter and that letter stated that the City and Guilds certificates were reviewed, but not whether they were accepted. The Officer disclosed that the Applicant has been assessed 13 years of education rather than 15, but not which elements of the Applicant's education history were considered invalid. Previous counsel attempted to clarify the situation but no response was received. In the CAIPS notes, there was nothing other than "13 YEARS OF EDUCATION/15 POINTS AWARDED."

[28] The Applicant cites *Via* at para. 22 which states that "the decision maker must set out its findings of fact and the principal evidence upon which those findings were based." The Applicant concludes that there was no explanation of the evidence upon which the findings for his application were based.

### **The Officer Failed to Properly Consider Substituted Evaluation**

[29] The Applicant further submits that section 78(3) of the Regulations allows an officer to consider factors other than points, and substitute his or her evaluation of an applicant whose points may not fully reflect his or her ability to become established in Canada. Consideration of substituted evaluation is not only “relative to the assessment of points”: *Hernandez v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1698 (F.C.) at paragraph 20.

[30] The Applicant submits that a consideration of substituted evaluation should include consideration of all the factors listed in section 76(1). In the Applicant’s initial application package, previous counsel expressly asked that positive discretion be exercised and cited the Applicant’s trade and job experience as a reason to exercise positive discretion. As well, evidence was adduced of settlement funds. No discussion about this was provided in the rejection letter.

[31] The Applicant further points out that the CAIPS notes do not include any analysis or comments regarding substitution of evaluation, except the statement that it had been considered and rejected. The CAIPS notes include an instruction that the drafter of the rejection letter include “A  
PASSAGE TO REFLECT THAT I HAVE CONSIDERED SUBSTITUTION OF

EVALUATION.” The Applicant submits that this is evidence that the consideration of substituted evaluation consisted of no more than a *pro forma* insertion of a boilerplate paragraph and that this cannot fulfill the requirements for the substantive consideration of positive discretion.

### **The Respondent**

#### **The Applicant Cannot be Awarded More than 15 Points for His Education**

[32] The Respondent submits that the Applicant’s argument that he should have been awarded 20 points for his education instead of the 15 points he received is unfounded. According to the statements made in the Applicant’s affidavit, his application for permanent residence status in Canada and his counsel’s letter in support of the application, the Applicant attended six years of elementary school, five years of secondary school, and then attended Thurrock Business College between April 1981 and March 1982 where he received his CPC Management certificate and Harlow College between June 1997 and June 1998, where he obtained a certificate in B TEC Management. Between June 2003 and June 2004, the Applicant attended Basildon and Thurrock College, where he received a certificate in Carpentry.

[33] The Respondent submits that the education history given by the Applicant, even taken at its highest, does not entitle him to 20 points for education due to the operation of subsections 78(2) and 78(3) of the Regulations. The Regulations also define “education credential” and, based on section 73 of the Regulations, educational credential refers to any diploma, degree, trade or apprenticeship credential issued on the completion of a program of study or training at an education or training

institution recognized by the authorities responsible for registering, accrediting, supervising and regulating such institutions in the country at issue. Assuming that the Applicant attended college on a full-time basis to obtain his college certificates in management and carpentry, he cannot be awarded 20 points for his education on the basis of having obtained education credentials in both management and carpentry. Therefore, the Applicant's total education, taken at its highest, would be 13 years full-time or full-time equivalent studies. In order to be awarded 20 points for education, the Applicant would need a two-year post-secondary education credential, other than a university educational credential, and a total of at least 14 years of completed full-time or full-time equivalent studies. Therefore, the number of points awarded to the Applicant's education cannot exceed 15.

[34] The Respondent submits that when calculating the total years of education needed to meet the requirements of Regulation 78, the Officer must consider whether the years of education completed led to the highest educational credential: *Bhuiya v. Canada (Minister of Citizenship and Immigration)* 2008 FC 878 (*Bhuiya*) and *Hussain*.

[35] The Respondent says that the rationale for this interpretation is that the conjunctive requirement of a specific number of years of full-time study ensures that educational credentials reflect a certain standard level of education, despite the existence of different requirements to attain these credentials all over the world. The Respondent relies upon the Regulatory Impact Statement ("RIAS"), SOR/2002-227, C. Gaz. 2002.II.221, which was published along with the introduction of this Regulation in the Canada Gazette and has been used by this Court in its interpretation of the provision: *Bhuiya*. It reads as follows:

#### Education: 25 Points

...Another change to the Education factor is the manner in which points will be allocated for each credential level. The applicant is allocated points for education on the basis of having both a credential (such as a diploma, degree, or apprenticeship certificate) and a minimum number of years of education and formal training. For example, for a Master's degree, an applicant must also have completed a total of at least 17 years of full-time or full-time equivalent studies. Given the range of educational and formal training systems around the world, this mechanism will serve to promote consistent standards in the assessment of education and training while still placing emphasis on the essentials—a credential as well as relevant minimum levels of education and formal training.

[36] The Respondent submits that the Applicant's BTEC certificate did not lead up to the highest educational credential. The Applicant says the Officer ignored this certificate, but the evidence shows that the certificate is a post-secondary credential at the same level as the City & Guilds diploma that the Applicant completed in 2005. The certificate was neither a prerequisite for the Applicant's completion of the City & Guilds Diploma, nor in a related field. Therefore, that year of education does not count as one year of full-time education leading to the Applicant's highest educational credential, which is the Intermediate Construction Award issued by City & Guilds. The year was not ignored; it simply did not qualify.

[37] The Respondent also points out that the one year at Thurrock Business College was not at full-time study and therefore did not meet Regulation 78(1). Therefore, the Applicant did not have the required 14 years of full-time study to be awarded 20 points.



### **No Reviewable Error with Respect to Substituted Evaluation**

[38] The Respondent says the Officer considered the Applicant's request for a substituted evaluation and responded to it in his reasons by stating that the number of points already awarded in this case were an accurate reflection of the likelihood of the Applicant's ability to become economically established in Canada.

[39] The Respondent says that the reasons were adequate and there is a limited duty on visa officers to explain why favourable consideration is not given under substituted evaluation: *Singh v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 65 (F.C.) at para. 33 and *Poblado v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1424 (F.C.) at paragraph 7. Therefore, there is no reviewable error in this regard.

### **Sufficient Reasons**

[40] The Respondent submits that the Officer's notes and refusal letter were sufficient to meet the reasons requirement in the Decision. The Officer has a limited duty to explain or justify why favourable consideration was not given in a substituted evaluation: *Singh* at paragraph 33; *Pablado* at paragraph 7 and *Yan v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 510 at paragraph 18.

[41] The Respondent also says that the Officer had no duty to explain the operation of the Act and the Regulations to the Applicant. The Officer's CAIPS notes were sufficient to inform the

Applicant that all of the evidence submitted was in fact considered and the points he was awarded in each category.

[42] The Officer's clarification letter also indicated that all of the evidence was considered and the Applicant only possessed 13 years of education for the purposes of Regulation 78(3). The Respondent notes that the Applicant does not seem to have been aware that all of his years of study have to be both full-time and at his highest education credential. The Respondent concludes that the reasons were sufficiently clear and allowed the Applicant to understand why his application was denied.

## **ANALYSIS**

[43] First of all, I agree with the Applicant that the Officer's affidavit of January 13, 2009 can be given no weight by the Court. It goes well beyond an elaboration of the reasons and provides an after-the-fact rationale for the central issue in this application concerning the way that the points were calculated. See *bin Abdullah v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1482 paragraphs 12-15.

[44] The Applicant's principal complaint is that the Officer failed to provide adequate reasons for her Decision on the number of points awarded to the Applicant. The Applicant relies upon Justice MacTavish's decision in *Adu v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 693 at paragraph 14:

In my view, these ‘reasons’ are not really reasons at all, essentially consisting of a review of the facts and the statement of a conclusion, without any analysis to back it up. That is, the officer simply reviewed the positive factors militating in favour of granting the application, concluding that, in her view, these factors were not sufficient to justify the granting of an exemption, without any explanation as to why that is. This is not sufficient, as it leaves the applicants in the unenviable position of not knowing why their application was rejected.

[45] Justice Lagacé’s decision in *Ogunfowora* at paragraph 60 is also instructive on this issue:

Clearly the CAIPS notes can constitute sufficient reasons, but only if they provide sufficient details for the person to know the reason for which the application was denied. On the basis of the tests outlined above, it would appear that the officer’s CAIPS notes in this case do not meet the necessary requirements. Although the notes state the basis for the decision, they do not provide in sufficient detail an analysis of why the officer held that the applicants would not return to Nigeria at the end of their authorized stay. This is further emphasized by the fact the officer thought it necessary to explain in more detail in his Affidavit to the Court why he decided the way he did. This reasoning should have been provided at the outset.

[46] The Respondent says that the rationale for the Decision is readily apparent from the record and from the Regulations which outline the basis upon which points are calculated, and that the Officer has no obligation to explain how the Regulations work. The facts were provided by the Applicant; the Officer simply applied them to the points grid which, in effect, is a structured way of examining the Applicant’s suitability for coming to Canada. The Applicant says that the Officer explained what he did with each aspect of the evidence provided by the Applicant, and this is sufficient.

[47] The letter of June 24, 2008 refers to the applicable Regulations, sets out the points awarded under the relevant headings and then informs the Applicant that “You have not obtained sufficient points to satisfy me that you will be able to become economically established in Canada.” No explanation is provided, for example, as to why the Applicant was awarded 15 points for “EDUCATION” out of a possible 25.

[48] Under “EDUCATION,” the CAIPS notes provide as follows:

One year BTEC and two separate city and guilds certificates. Copies provided 13 years of education  
15 points awarded.

[49] The Applicant believes that he has 15 years of education and should have been awarded 20 points, which would give him a qualifying score.

[50] It is obviously not possible to tell from the record why the Officer felt the Applicant only had 13 years of education, and the fact that the Officer has recently provided a detailed affidavit justifying his calculations is a clear confirmation that the letter and CAIPS notes do not explain that issue.

[51] So the issue for the Court is whether the Officer’s indication that he awarded 15 points for what he regarded as 13 years of education is sufficient reasons in this case.

[52] A question as to the sufficiency of reasons supporting a decision is a procedural fairness issue. As Justice MacTavish pointed out in *bin Abdullah* at paragraph 11 “the task of the Court is to

determine whether the reasons provided by the decision-maker satisfy the level of fairness required in all the circumstances: *Sketchley v. Canada (Attorney General)*, [2005] F.C.J. No. 2056, 2005 FCA 404, at paragraphs 52-53.”

[53] It is also apparent that, in this case, the Officer was asked by the Applicant through his counsel why his 15 years of full-time study, in conjunction with his two-year certificate, did not warrant 20 points for education. The Officer replied on June 30, 2008:

Your application was carefully considered according to the applicable section of the *Immigration and Refugee Protection Act*. You were provided with the decision containing the full reasons for refusing the application by letter addressed to you dated 24 June 2008, thereby fully concluding the application. The file was closed on that date.

The City and Guilds certificates were reviewed at the time of file assessment, but as stated on the application form, you completed 13 years of education and so 15 points are applicable.

[54] This does not answer the point raised by the Applicant and does not go beyond the Decision.

[55] As the Officer’s recent affidavit of January 13, 2009 reveals, it would have required very little effort to explain to the Applicant that the Thurrock Business College and BTEC Professional Development Certificate could not be credited because the Thurrock certificate was not a post-secondary credential as defined by Regulation 73 and was not evidence of one year of full-time or full-time equivalent study pursuant to Regulation 78(1), and the BTEC certificate was not a prerequisite for the Applicant’s completion of the City and Guilds diploma, so that it could not count as one year of full-time education leading to his highest educational credential.

[56] I do not think this was a matter of interpreting the Regulations to which the Applicant and his lawyer have ready access. It was a matter of the Officer's view of what the two discounted certificates represented. Obviously, as the Officer's recent affidavit makes clear, it was not possible to tell from the Decision why they were discounted. Further explanation was required.

[57] Of course, it would be entirely undesirable if the Officer had to provide the kind of detailed reasons that are evident in the recent affidavit, or if applicants were encouraged to engage in protracted post-decision debates. But the best way to avoid this is to provide a brief explanation on the key point at issue. In this case, the key point was obviously that the Thurrock and BTEC certificates could not be used to count the Applicant's years of full-time education leading to the City and Guilds credential for the reasons referred to in paragraph 51 above. That is all he needed to know.

[58] In my view then, in all the circumstances of this case, the reasons were inadequate. This was a decision of importance for the Applicant's future. He could not surmise from the Decision why the Thurrock and BTEC certificates had been awarded 0 points. The Officer's position was simply that he had no obligation to explain to the Applicant why he had taken a position on the facts that the two certificates in question would not be credited. This prevented any understanding or questioning of the Officer's position on the facts. It was a denial of the Applicant's right to comprehend why he had been refused and an attempt to thwart any action he might take to question the Officer's Decision. It left him to choose between incomprehension and legal action.

[59] Having come to this conclusion, it is unnecessary for me to consider the other issues raised by the Applicant. However, the Respondent says there is no point in sending this matter back for reconsideration because the Officer was correct and the Applicant suffered no prejudice. The Respondent says the result will be entirely the same if the application is reconsidered.

[60] Because there is nothing before me but the Officer's recent affidavit (which I have left out of account except in so far as it illustrates why the reasons were inadequate) I cannot say that the critical education calculation was correct or what another officer might make of the situation. And I think, in fairness to the Applicant, that he should have the matter reviewed by someone else who will explain to him what his certificates represent and how they merit, or do not merit, points under the Regulations. It is also clear that a simple explanation by the Officer could have prevented what has become a significant waste of time and resources on both sides.

[61] Counsel are requested to serve and file any submissions with respect to certification of a question of general importance within seven days of receipt of these Reasons for Judgment. Each party will have a further period of three days to serve and file any reply to the submission of the opposite party. Following that, a Judgment will be issued.

“James Russell”

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Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** IMM-3798-08

**STYLE OF CAUSE:** PATRICK LESLIE HEALEY

APPLICANT

- and -

THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

RESPONDENT

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** FEBRUARY 26, 2009

**REASONS FOR :** HON. MR. JUSTICE RUSSELL

**DATED:** April 8, 2009

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