

Federal Court



Cour fédérale

**Date: 20120207**

**Docket: IMM-4789-10**

**Citation: 2012 FC 167**

**Ottawa, Ontario, February 7, 2012**

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

**BETWEEN:**

**JERONIMO JOVITO DE SOUZA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of the Decision of the Designated Immigration Officer (Officer), High Commission of Canada, Immigration Section, London, United Kingdom, dated 20 July 2010, to refuse the Applicant's application for a permanent resident visa as a member of the Federal Skilled Worker Class based on the Applicant's failure to meet the requirements.

## BACKGROUND

[2] The Applicant is a citizen of India currently living in Oman.

[3] The Applicant applied for a permanent resident visa as a member of the Federal Skilled Worker Class. His educational history shows that he completed twelve years of secondary school, followed by a three-year Diploma in Mechanical Engineering. In the final two years of secondary school, he completed a two-year Higher Secondary Certificate. Such a certificate was not required to enter the Diploma course; the Applicant was eligible to enter the Mechanical Engineering program after his tenth year of education.

[4] The Officer calculated the number of points to be allotted to the Applicant for each of the criteria set out in subsection 76(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations). The criteria are: age; education; proficiency in Canada's official languages; experience; arranged employment; and adaptability. The Officer concluded that the two years spent on the Higher Secondary Certificate should not be taken into account in calculating the number of points to be allotted to the Applicant's education. The Officer calculated that the Applicant's ten years of secondary school and his three-year Diploma program entitled him to 15 points. The Applicant's total for all six criteria was 66 points, which is one point below the 67-point minimum requirement. By letter dated 20 July 2010, the Officer notified the Applicant that his application was refused. This is the Decision under review.

[5] At the hearing before me, counsel informed the Court that appeals were pending in *Khan v Canada (Minister of Citizenship and Immigration)* 2010 FC 983, *Kabir v Canada (Minister of Citizenship and Immigration)* 2010 FC 995, and *Hasan v Canada (Minister of Citizenship and Immigration)* 2010 FC 1206 and that the Federal Court of Appeal could deal in those cases with the issues raised in this application. This application was therefore held in abeyance until the Federal Court of Appeal ruled in at least two of the three cases above. The Federal Court of Appeal heard the three appeals together and delivered its reasons on 6 December 2011 (*Khan v Canada (Minister of Citizenship and Immigration)* 2011 FCA 339).

[6] The Respondent brought the Federal Court of Appeal decision to the Court's attention by letter dated 7 December 2011. The Applicant was invited to make submissions on the applicability of *Khan* and did so on 19 December 2011. The Respondent made his reply on 19 December 2011. These reasons incorporate the parties' submissions on *Khan*, as well as submissions they made prior to the hearing before me.

## **DECISION UNDER REVIEW**

[7] The Decision states that, under subsection 12(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), a foreign national may be selected as a member of the federal skilled worker class if he can show that he is able to become economically established in Canada. The foreign national's ability to establish himself is assessed using the six criteria set out in subsection 76(1) of the Regulations. The Applicant's assessment is as follows:

<b>Criteria</b>	<b>Points Assessed</b>	<b>Maximum Possible</b>
Age	10	10
Education	15	25
First Official Language Proficiency	16	16
Second Official Language Proficiency	00	8
Experience	21	21
Arranged Employment	00	10
Adaptability	04	10
<b>TOTAL</b>	<b>66</b>	<b>100</b>

[8] The Decision further states:

You have obtained insufficient points to qualify for immigration to Canada, the minimum requirement being 67 points. Note that you were given the highest possible units of assessment under the Regulations based on the information you have submitted. Had you met the current passmark, the information you have provided would have been subject to further verification. Based on the information submitted in your application, you have achieved a three-year Diploma in Mechanical Engineering. Although you completed a Higher Secondary Certificate prior to your Diploma, the two years required for such a credential were not required to enter your Diploma course and, therefore, cannot be counted towards the number of years required for your Diploma pursuant to Subsection R78(3)(a) of the Act. Based on documents submitted in support to [sic] your application, your highest level of education achieved is your Diploma, obtained in 1986. This credential of a duration of three years year falls under subsection R78(2)(c)) in view of the number of years of education required for its completion. Pursuant to subsection R78(3)(b)(i) of the Act, you therefore receive 15 units of assessment for the education factor. You have not obtained sufficient points to satisfy me that you will be able to become economically established in Canada. [my emphasis]

## ISSUE

[9] At issue in the present application is the Officer's award of points for education. This raises the following two issues:

1. Whether the Officer erred in concluding the Applicant had 13 years of education; and
2. Whether the Officer erred in awarding 15 points for education.

## STATUTORY PROVISIONS

[10] The following provisions of the Regulations are applicable in these proceedings:

### Definitions

**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.  
 Education (25 points)

### Définitions

**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.  
 Études (25 points)

(2) A maximum of 25 points shall be awarded for a skilled worker's education as follows:

(a) 5 points for a secondary school educational credential;

(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;

(c) 15 points for

(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

(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;

(d) 20 points for

(i) a two-year post-secondary educational credential, other than a university educational credential, and a total of at least 14 years of completed full-time or full-time equivalent studies, or

(2) Un maximum de 25 points d'appréciation sont attribués pour les études du travailleur qualifié selon la grille suivante :

a) 5 points, s'il a obtenu un diplôme d'études secondaires;

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, si, selon le cas :

(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) 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, si, selon le cas :

(i) il a obtenu un diplôme postsecondaire — autre qu'un diplôme universitaire — nécessitant deux années d'études et a accumulé un total de quatorze années d'études à temps plein complètes ou l'équivalent temps plein,

(ii) a two-year university educational credential at the bachelor's level and a total of at least 14 years of completed full-time or full-time equivalent studies;

(ii) il a obtenu un diplôme universitaire de premier cycle nécessitant deux années d'études et a accumulé un total d'au moins quatorze années d'études à temps plein complètes ou l'équivalent temps plein;

(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 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.

### **Multiple educational achievements**

### **Résultats**

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

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

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

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

(b) shall be awarded

(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.

b) ils sont attribués :

(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 prévu à l'un de ces alinéas ou sous-alinéas, il obtient le nombre de points correspondant au nombre d'années d'études à temps plein complètes — ou leur équivalent temps plein — mentionné dans ces dispositions.

## STANDARD OF REVIEW

[11] At paragraph 26 of *Khan*, above, Justice Pelletier held that

This Court has held that the standard of review to be applied to a visa officer's decision is correctness; see *Patel v Canada (Minister of Citizenship and Immigration)* 2011 FCA 187, [2011] F.C.J. No 843 at para. 27, consequently, the standard of review of the visa officer's decisions in these cases is correctness.



## ARGUMENTS

### The Applicant

[12] The Applicant argues that his education should have been assessed at 22 points rather than the 15 allotted by the Officer.

[13] The Applicant relies on the decision of this Court in *McLachlan v Canada (Minister of Citizenship and Immigration)* 2009 FC 975. In that case, the applicant completed an extra year of secondary education to improve his grades. The officer decided that this year should not figure in the calculation of the number of points awarded for his education. Justice Leonard Mandamin, in allowing the judicial review, found at paragraph 32 that the officer's analysis "focussed on a tallying of effective years of studies" without appropriate regard to the level of educational attainment. As section 78 of the Regulations is "directed at assessment of educational accomplishment," and not at "tallying effective years of studies," the officer's assessment was flawed. The Applicant says that that is what has happened in his case. Further, the Applicant says his position is supported by the wording of subsection 78(4) of the Regulations, which makes educational achievement the most important criterion.

[14] The Applicant distinguishes Justice Anne Mactavish's decision in *Bhuiya v Canada (Minister of Citizenship and Immigration)* 2008 FC 878, based on its unique facts. In that case, the Applicant's extra year of study was not aimed at following a particular educational plan but rather was an "[attempt] to get an extra point or two."

## The Respondent

[15] The Respondent contends that the Officer did not err in discounting the two-year Higher Secondary Certificate. Paragraph 78(3)(a) of the Regulations clearly states that “points shall be not be awarded cumulatively on the basis of more than one single educational credential.” The Officer complied with this provision by awarding points on the basis of the single educational credential that resulted in the highest number of points: the Diploma in Mechanical Engineering. The Higher Secondary Certificate was not a prerequisite for entrance into the Mechanical Engineering program; it was a separate educational credential unrelated to the Applicant’s ultimate field of study. Therefore, the Officer was right to leave it out of account.

[16] Accepting the Applicant’s position would lead to absurd results because it would open the door for applicants to spend more time at school without achieving a credential, solely to improve their chances of immigration to Canada. For example, had the Applicant taken a two-year culinary course, by his reasoning he would be entitled to use this program to obtain points even though it has nothing to do with his chosen field, the career being assessed (mechanical engineer), or his ability to become economically established in Canada. The Applicant’s interpretation of the Regulations is contrary to Parliament’s intention to maintain the integrity of Canada’s immigration system.

[17] The Respondent argues that his position is consistent with the jurisprudence of this Court. Justice Max Teitelbaum stated in *Roberts v Canada (Minister of Citizenship and Immigration)* 2009 FC 518 at paragraph 18:

Even if it had been before the Officer, the extra year of A Level study would not be relevant to the assessment of education

credentials. In *Bhuiya v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 878, [2008] F.C.J. No. 1110, Justice Anne Mactavish explained that “the years of education requirement is clearly intended to establish minimum standards for each type of degree” and the fact that an applicant may have spent one additional year in school after obtaining their degree “does not turn a 16 year Master’s degree into a 17 year Master’s degree”. That same logic applies here: the fact that the Applicant spent an extra year in school after obtaining her O Levels does not turn an 11-year Diploma into a 12-year one.

[18] The Applicant relies on subsection 78(4) of the Regulations and *McLachlan*, above.

However, the Respondent argues that *McLachlan* is distinguishable on its facts. In that case, Justice Mandamin allowed the application because the officer had failed to consider special circumstances that warranted awarding the applicant the number of points corresponding to the academic credential attained, notwithstanding that the applicant had not completed the specified years of study. In this case, no special circumstances exist, and the Applicant was awarded all the points allowable under the Act for his educational achievements. Moreover, Justice Elizabeth Heneghan, in *Khan*, above, at paragraphs 15-19, and *Kabir*, above, endorsed *Bhuiya*, above, and departed from *McLachlan*, finding that the latter was “manifestly wrong” in that it “failed to consider the legislation or binding authorities that would have produced a different result.”

### **The Applicant’s Reply**

[19] The Applicant contends that the Officer viewed his Diploma as lacking “the same efficacy as other Diplomas” because students could enter the program after 10 years of secondary education. This indicates that the Officer has read a requirement of 12 years secondary education into paragraph 78(2)(d) of the Regulations. This manner of assessing applications under the skilled

worker program is not supported by the Act or the Regulations. A plain reading of the relevant provisions demonstrates that the level of educational achievement must take precedence over the “tallying of effective years of studies.” The value of the Applicant’s educational credential should not be diminished simply because he could have accomplished it in fewer years. The Regulations should be interpreted in positive terms because, “The purpose of the statute is to permit immigration, not prevent it.” See *Hajariwala v Canada (Minister of Employment and Immigration)* (1988), [1989] 2 FC 79, [1988] FCJ No 1021 (FC).

## ANALYSIS

[20] In *Khan*, above, the Federal Court of Appeal answered the following question, certified by two judges in three cases:

In assessing points for education under section 78 of the *Immigration and Refugee Protection Regulations*, does the visa officer award points for years of full-time or full-time equivalent studies that did not contribute to the educational credential being assessed?

[21] Writing for the Court in *Khan*, Justice Denis Pelletier answered the question in this way at paragraph 56:

In assessing points for education under section 78 of the *Immigration and Refugee Protection Regulations*, the visa officer does not award points for years of full-time or full-time equivalent studies that do not contribute to the educational credential being assessed. That is, visa officers must give credit only for years of study which the national authorities identify as the norm for the achievement of the educational credential in issue.

[22] I think the answer to the certified question clearly disposes of the first issue in the present case. I also think that Justice Pelletier’s reasons provide guidance in answering the second issue.

**Impact of *Khan*****Thirteen or Fifteen Years?**

[23] The Applicant has completed twelve years of secondary education, including a two-year Higher Secondary Certificate, and three years of post-secondary education, after which he earned a Diploma in Mechanical Engineering. According to the Decision, the Applicant could have entered the diploma program after ten years of secondary education. Because his Higher Secondary Certificate was not a pre-requisite for his Diploma, the Officer excluded the two years it took to achieve the Higher Secondary Certificate and calculated his cumulative years of education as:

10 years secondary education + 3 years post-secondary = 13 years of education.

[24] According to the Applicant, the calculation should have been:

12 years secondary education + 3 years post-secondary = 15 years of education.

[25] Under the first calculation, the Officer awarded the Applicant 15 points for education under subparagraph 78(2)(c)(i) of the Regulations. Under the second calculation, the Applicant says that he falls under subparagraph 78(2)(e)(i) of the Regulations and so should have been awarded 22 points. Leaving aside for the moment the question of whether the Officer's award of points was correct or reasonable, I think it is clear that the Officer's calculation of years of education is correct.

[26] Under paragraph 78(3)(a) of the Regulations, points are not awarded cumulatively for more than one credential. Under subparagraph 78(3)(b)(i), points are awarded on the basis of the credential which would result in the highest award of points. The Applicant holds two credentials

which are captured by subsection 78(2): a Higher Secondary Certificate (paragraph 78(2)(a)) and a Post-secondary Diploma in Mechanical Engineering (paragraph 78(2)(c) or (e)).

[27] Regardless of which paragraph dealing with post-secondary credentials is applicable in this case, the Applicant's Diploma is the single credential which would result in the highest award of points. The Applicant would be awarded 5 points under paragraph 78(2)(a) for his Higher Secondary Certificate. The fewest points he could be awarded for his Diploma is 15 under subparagraph 78(2)(c)(i). The Officer was correct to determine the Applicant's points for education on the basis of his Diploma, as this credential clearly leads to the highest award of points.

[28] This leads to the question of the appropriate number of years of full-time education on which to award the Applicant points under paragraph 78(2)(c) or (e). Put another way, did the Officer act inappropriately in excluding the two years the Applicant spent getting his Higher Secondary Certificate from her calculation of his years of education? After *Khan*, I think the answer is clearly no.

[29] At paragraph 53 of *Khan*, Justice Pelletier had this to say on the issue:

To summarize, subsections 78(3) and (4) of the Regulations provide that applicants are to be assessed on the basis of their single highest educational credential, without cumulating points for other equal or lesser credentials. Where another credential is a pre-requisite for the higher credential, the years of study associated with that other credential are included in the program of studies for the higher credential established by the national authorities. Where the other credential is not a pre-requisite for the candidate's highest credential, the years of study leading to that credential are not to be cumulated with the years of completed study attributable to the highest credential, since the candidate's application is to be assessed on the basis of a single educational credential [Emphasis Added]

[30] In the present case, the Officer found that the Higher Secondary Certificate was not a prerequisite for the Applicant's Diploma. She said that,

Although you completed a Higher Secondary Certificate prior to your diploma, the two years required for such a credential were not required to enter your Diploma course and, therefore, cannot be counted towards the number of years required for your Diploma pursuant to Subsection R78(3)(a) of the Act."

[31] *Khan* makes it clear that the Officer's finding that the Applicant had thirteen years of education is correct. The Higher Secondary Certificate was not a prerequisite for the Diploma, so the two years it took to attain that credential must be excluded. This leaves the Applicant with ten years of secondary education. He also has three years of post-secondary education, for a total of thirteen years of education. I do not think there can be any other conclusion than that the Applicant has thirteen years of full-time education.

### **How Many Points?**

[32] Although *Khan* clearly establishes that the Applicant has thirteen years of education, this does not dispose of all the issues in the present case. The question still remains as to how many points the Applicant should be awarded.

[33] The Applicant has thirteen years of education and a three-year post-secondary credential. As I read the Regulations, he can only fall into one of two subparagraphs: 78(2)(c)(i) or 78(2)(e)(i).

These sections read:

**78.** [...] (2) A maximum of 25 points shall be awarded for a skilled worker's education as

**78.** [...] (2) Un maximum de 25 points d'appréciation sont attribués pour les études du

follows:	travailleur qualifié selon la grille suivante :
(c) 15 points for	c) 15 points, si, selon le cas :
(i) a one-year post-secondary educational credential, other than a university educational credential, <u>and a total of at least 13 years of completed full-time or full-time equivalent studies,</u> [emphasis added]	(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,
[...]	[...]
(e) 22 points for	e) 22 points, si, selon le cas :
(i) a <u>three-year post-secondary educational credential</u> , other than a university educational credential, and a total of at least 15 years of completed full-time or full-time equivalent studies, [emphasis added][...]	(i) il a obtenu un diplôme postsecondaire — autre qu’un diplôme universitaire — nécessitant trois années d’études et a accumulé un total de quinze années d’études à temps plein complètes ou l’équivalent temps plein,

[34] The Applicant does not fall neatly into either category. He holds a three-year post-secondary credential – his Diploma, which puts him above the “credential requirement” of 78(2)(c)(i), though he has the exact number of years required under that subparagraph. On the other hand, his Diploma meets the credential requirement under subparagraph 78(2)(e)(i), but he does not have the fifteen years of education required. I believe that this is the situation that subsection 78(4) attempts to address, though it is poorly worded and does not offer very clear guidance:

(4) For the purposes of subsection (2), if a skilled	(4) Pour l’application du paragraphe (2), si le travailleur
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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

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 prévu à l'un de ces alinéas ou sous-alinéas, il obtient le nombre de points correspondant au nombre d'années d'études à temps plein complètes — ou leur équivalent temps plein — mentionné dans ces dispositions.

[35] The Applicant relies upon *McLachlan*, above, to say that, where an applicant has a credential but not the required years of study, subsection 78(4) operates such that points should be awarded on the basis of the credential alone (see paragraph 49). In *Khan*, however, Justice Pelletier says at paragraph 50 that *McLachlan*, “is wrongly decided and ought not to be followed.”

### **Awarding Points: A New Approach**

[36] In overruling *McLachlan*, Justice Pelletier says that it is not possible to award points on the basis of a credential without the matching number of years. That is, where an applicant holds a three-year post-secondary credential but does not have the full fifteen years of education required by 78(2)(e)(i), he cannot be awarded the full 22 points under that subparagraph. Justice Pelletier provides the following guidance at paragraphs 50 to 52 of *Khan*:

In my view, *McLachlan* is wrongly decided and ought not to be followed. The interpretation of subsection 78(4) adopted by the

Federal Court in that case cannot be sustained when the disposition is read carefully.

It is true, as the Federal Court judge noted in *McLachlan*, that subsection 78(4) is intended to be a remedial measure and that it is badly drafted. If subsection 78(4) is applied literally, its effect is rather punitive. It provides that a person who comes within the subsection 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 subparagraph. To use paragraph 78(2)(f) as an example, a candidate who had a master's degree but lacked the required 17 years of completed studies would be awarded 17 points since that is the number of years set out in paragraph 78(2)(f). This is fewer points than the person would receive if they applied on the basis of either a two year post secondary education credential (20 points and 14 years of full time studies) or a three year post secondary educational credential (22 points and 15 years of full time studies).

Since subsection 78(4) is remedial, it is unlikely that this was the result desired by Parliament. However, this result cannot be avoided by reading the words “as the number of years of completed full-time or full-time equivalent studies” out of the [section], as the Federal Court judge in *McLachlan* appears to have done, relying on the marginal note “Special Circumstances” in the official version of the Regulations to do so. Section 14 of the *Interpretation Act*, R.S.C., 1985, c. I-21, makes it clear that marginal notes form no part of an enactment. As a result, the interpretation of subsection 78(4) set out in *McLachlan* is fatally flawed [emphasis added]

[37] As I read this passage, the Federal Court of Appeal is saying that under subsection 78(4) an officer must first look to the credential held by the applicant. Where the applicant has a credential, the officer must then determine whether the applicant has the number of years of full-time education set out in the Act; if he has the required number of years, the officer must then award full points under the subparagraph. Where the applicant does not have the required number of years, the officer should award points equal to the number of years of education required in the section.

[38] In this case, the Applicant has a three-year post-secondary credential and thirteen years of education. Following the above approach, then, we look to subparagraph 78(2)(e)(i). The Applicant does not have the required years of education, so we must award the same number of points as the number of years in the subparagraph, fifteen. This is the same number of points that the Officer awarded, though for a different reason.

[39] In terms of disposition of the judicial review, I do not think it makes any sense to return the Decision for reconsideration. On the facts as established, I do not think the Applicant can be awarded any more points than the fifteen points he was initially awarded. Absent any breach of procedural fairness, there is nothing to be gained by returning the Decision. The application for judicial review should be denied.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that**

1. The application is dismissed.
2. There is no question for certification.

“James Russell”  
\_\_\_\_\_  
Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** IMM-4789-10

**STYLE OF CAUSE:** **JERONIMO JOVITO DE SOUZA**

- and -

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** April 11, 2011

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

**DATED:** February 7, 2012

**APPEARANCES:**

Cecil L. Rotenberg

**APPLICANT**

Gordon Lee

**RESPONDENT**

**SOLICITORS OF RECORD:**

Cecil L. Rotenberg  
Barrister & Solicitor  
Toronto, Ontario

**APPLICANT**

Myles J. Kirvan, Q.C.  
Deputy Attorney General of Canada

**RESPONDENT**