Federal Court  Cour fédérale

Date: 20120820

Docket: IMM-5733-11

Citation: 2012 FC 1005

Ottawa, Ontario, August 20, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

MUHAMMAD ZULHAZ UDDIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of an immigration officer at the High Commission of Canada in Singapore (the officer), dated May 24, 2011, wherein the applicant was denied permanent residence under the federal skilled worker class pursuant to subsection 12(2) of the Act and subsection 76(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). This decision was based on the officer's finding that the applicant's English language proficiency was insufficient for him to become economically established in Canada.

[2] The applicant requests that the officer's decision be quashed and the matter be remitted for redetermination by a different officer, at a different visa office, or both.

Background

[3] The applicant, Muhammad Zulhaz Uddin, is a citizen of Bangladesh. He is married with one dependent child.

[4] On November 10, 2009, the applicant filed an application for permanent residence under the federal skilled worker class. His listed occupations were financial manager (NOC 0111) and/or accountant (NOC 1111).

[5] In a letter dated March 3, 2011, the officer informed the applicant that he had assessed the applicant's application and the applicant had received 72 points. Nevertheless, the officer stated that he was considering making a negative substituted evaluation finding pursuant to subsection 76(3) of the Regulations. The officer explained that he considered the applicant's English language abilities were such that the points awarded to him were not a sufficient indicator of his likelihood of becoming economically established in Canada. The officer stated:

> I am not satisfied that this level of English competency would facilitate your economic establishment in Canada, as a Financial Manager, or similar, nor am I satisfied that you have otherwise acceptable experience in another field of expertise, found on the NOC list, in which you might reasonably be expected to secure employment. You have not demonstrated that you are sufficiently proficient in English to communicate as effectively as would be required in your field of expertise.

[6] The applicant was given sixty days to respond to the officer's concerns.

[7] On April 25, 2011, the applicant sent the Canadian High Commission in Singapore supplementary submissions to address the officer's concerns. These submissions included: a statement from the applicant regarding his English language abilities; an updated personal worth statement with supporting evidence; and proof of relationship to cousin in Canada and evidence of cousin's residence in Canada.

Officer's Decision

[8] In a letter dated May 24, 2011, the officer denied the applicant's application for permanent residence as a skilled worker. The Computer Assisted Immigration Processing System (CAIPS) notes that form part of the officer's decision also explain the reasons for the denial.

[9] The officer stated that the applicant's application was assessed based on the occupation requests: NOC Code: 1111, financial administrator or similar. The officer assessed the following points for the applicant:

Age:	10 points
Education:	25 points
Official language proficiency:	6 points
Experience:	21 points
Arrangement employment:	0 points
Adaptability:	10 points

[10] The points for adaptability were calculated based on the sum of five points for the applicant's spouse's education and five points for having a relative in Canada.

[11] The points for official language proficiency were based on the applicant's International English Language Testing System (IELTS) test on April 10, 2010. These test results indicated that the applicant was a modest user of English as per the IELTS band scale descriptions.

[12] The officer noted that in a letter dated March 3, 2011, the applicant was informed that his application was being considered for refusal on the basis of his limited ability to communicate in English. Recognizing the subsequent submissions that the applicant made in response to this letter, the officer stated:

> […] I am unsatisfied that the points awarded to you accurately reflect the likelihood that you will be able to successfully economically establish in Canada; your submission did not present any new evidence or information that has changed my assessment of your file. I have made this evaluation because, as a Financial Administrator, or similar, fields for which communication is critical, prospective employers would reasonably expect you to be able to communicate at a high level in English, or French. […]

[13] In the CAIPS notes, the officer expanded on his reasons. Referring to the new evidence submitted on the applicant's cousin, the officer noted:

> Note that rep now states that PA [applicant] has maternal cousin in Canada; not included on original applcication [sic]. Nonetheless, this information per relative in Canada does not present new information that would positively impact my concerns re PA's [applicant's] ability to establish. Cousin states she will assist PA [applicant] if required; note that PA's [applicant's] letter of employment shows her salary at $11.00/hour. Combined with concerns over PA's [applicant's] capacity in English, hsi [sic] family make-up (spouse

> and child), conncers [sic] remain that PA [applicant] will not establish economically under NOC code applied for.

[14] The officer also stated that a senior officer concurred in his evaluation of the applicant's application and subsequent submissions.

[15] The Court notes that although the officer referred to 67 points being awarded to the applicant, in fact the total number of points awarded was 72.

Issues

[16] The applicant submits the following points at issue:

1. What is the appropriate standard of review?
2. Did the officer err in substituting a negative determination pursuant to subsection 76(3) of the Regulations?

Applicant's Written Submissions

[17] The applicant submits that this judicial review concerns a question of fact and law. It therefore attracts a standard of review of reasonableness.

[18] The applicant does not dispute the points awarded for his application. Rather, the applicant submits that the officer erred in substituting a negative determination pursuant to subsection 76(3)

of the Regulations. This error arose from the officer's failure to consider all the evidence before him.

[19] The applicant also submits that the officer failed to assess the applicant's ability on the broader and correct standard of the likelihood of becoming economically established. Rather than concluding that the applicant needed to demonstrate that he could pursue a career as a "financial administrator or similar", the officer should have considered whether the applicant would become economically established as a skilled worker and not just in the limited professions noted in the decision. This need is reflected in the changes to the Act and Regulations, which altered the approach to skilled worker applications from an occupation-specific one to one that emphasizes the adaptability of skilled worker applicants to become economically established.

[20] In support of his position that the officer did not consider all the evidence before him, the applicant highlights specific grounds that he included in his response to the officer's request for more information, namely:

1. His ability to work constructively in the English language on a daily basis at his workplace in Bangladesh;

2. The availability of settlement funds to cover his short and mid-term financial obligations in Canada (an amount double that which he initially indicated); and

3. The presence of his cousin, Sharminaz Sultana in Canada who has offered to provide financial and emotional support to the applicant and his family.

[21] The applicant submits that the officer was required to reflect his assessment of this information in his decision. The officer also erred in not referring to the settlement funds in his decision.

[22] With regards to his cousin in Canada, the applicant submits that the officer erred by dismissing this evidence on the basis of the cousin's hourly salary. This approach failed to take into account the cousin's spouse and led to the suggestion that the applicant would be financially reliant on his cousin. The officer thus misconstrued the purpose of the cousin's evidence. As the applicant did have access to settlement funds, his cousin's evidence was merely provided to show that there was a home available to the applicant and his family in Canada until they became settled.

[23] In summary, the applicant submits that any reasonable analysis of the evidence would indicate that the applicant would not have any difficulty in becoming successfully economically established in Canada.

Respondent's Written Submissions

[24] The respondent agrees with the applicant that the standard of review of the officer's decision is reasonableness.

[25] In response to the applicant's allegation that the officer limited his assessment to the applicant's potential to become economically established as a "financial administrator or similar", as opposed to as a skilled worker in general, the respondent submits that the CAIPS notes clearly

indicate that the officer did consider the applicant's potential for establishment in other fields of expertise on the NOC list.

[26] The respondent submits that the applicant's English skills were properly assessed. The respondent highlights the fact that the officer gave the applicant sixty days to provide additional information after making his preliminary finding. However, aside from a personal statement, the applicant did not provide any documentation to support his submissions that:

1. The language of choice at his workplace in Bangladesh was English;
2. He intended to work in Canada in the same capacity as he does in Bangladesh; and
3. Notwithstanding his English language deficiencies, he had demonstrated professional success in Bangladesh.

[27] The respondent submits that an applicant's settlement fund is not a relevant consideration in a substituted evaluation. Further, the applicant did not explain how his settlement fund would alleviate the officer's concerns about his limited English capabilities. The officer therefore did not err in not considering the settlement funds in his decision.

[28] Finally, the respondent submits that there is no merit to the applicant's allegation that the officer did not consider his cousin in Canada. The CAIPS notes clearly indicate that this evidence was considered. The respondent acknowledges the applicant's submissions that his cousin was prepared to assist him in the transition to Canada, both her and her husband were employed on a full-time basis and that they owned a home in Brampton where the applicant and his family could stay until they adjusted to life in Canada. However, none of these submissions explained why the

presence of the applicant's cousin should alleviate the officer's concerns about his limited English. The applicant's submissions are thus limited to the officer's weighing of the evidence, which does not amount to a reviewable error.

Analysis and Decision

[29] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[30] A determination under subsection 76(3) of the Regulations is a fact-driven exercise in an area where officers have significant experience. It is therefore reviewable on a standard of reasonableness (see *Debnath v Canada (Minister of Citizenship and Immigration)*, 2010 FC 904, [2010] FCJ No 1110 at paragraph 8; *Philbean v Canada (Minister of Citizenship and Immigration)*, 2011 FC 487, [2011] FCJ No 606 at paragraph 8; and *Roohi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1408, [2008] FCJ No 1834 at paragraph 13).

[31] In reviewing the officer's decision on the standard of reasonableness, the Court should not intervene unless the officer came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339

at paragraph 59). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraphs 59 and 61).

[32] **Issue 2**

Did the officer err in substituting a negative determination pursuant to subsection 76(3) of the Regulations?

The current regulatory scheme for permanent residence applicants under the skilled worker class was succinctly described by Madam Justice Danièle Tremblay-Lamer in *Philbean* above, at paragraph 9:

> Subsection 12(2) of the IRPA indicates that, for the purposes of permanent residence, a person may be selected as a member of the economic class on the basis of their ability to become economically established in Canada. Subsection 76(1) of the Regulations indicates that, for the purposes of determining whether a skilled worker will be able to become economically established in Canada, two requirements must be met: a) the applicant must be awarded at least a minimum number of points based on education, language, experience, age, arranged employment, and adaptability, and b) the applicant must either (i) have a certain amount of money available to use for settlement in Canada, or (ii) have been awarded a certain number of points for having already arranged employment in Canada. […]

[33] In this case, the officer first assessed the applicant's application under subsection 76(1) of the Regulations and thereby awarded the applicant 72 points. The officer then exercised his discretion under subsection 76(3) of the Regulations to evaluate the likelihood of the applicant becoming economically established in Canada despite the fact that the points awarded to him met the statutory requirement.

[34] Madam Justice Tremblay-Lamer also described this provision in *Philbean* above, at paragraph 11:

> Subsection 76(3) of the Regulations […] allows for an immigration officer to substitute his or her own evaluation as to whether or not an applicant will be able to become economically established in Canada for the points-based assessment set out in paragraph 76(1)(a) in circumstances where the officer finds that the number of points awarded is not a sufficient indicator as to the applicant's actual ability to become established. Justice Leonard Mandamin, in *Roohi*, above, described subsection 76(3) as allowing, inter alia, "for screening out applicants who pass the initial assessment but ought not be accepted for valid reasons".

[35] As noted by the applicant, subsection 76(3) requires a two-stage analysis. This analysis was described by Mr. Justice Leonard Mandamin in *Roohi* above, at paragraph 17:

> Section 76(3) engages a two stage process for arriving at a substituted evaluation: first, the visa officer must decide if the s. 76(1) assessment is not a sufficient indicator of whether the skilled worker applicant may become economically established in Canada; second, the visa officer must evaluate the likelihood of the skilled worker becoming economically established in Canada by conducting an adequate substitute assessment on proper grounds.

[36] These substituted evaluations under subsection 76(3) of the Regulations introduce an element of flexibility into the skilled worker application process (see *Roohi* above, at paragraph 25). Deference is owed to the officer in making the decision; however, it must nonetheless be consistent with the Act, the Regulations and the thrust of the skilled worker provisions (see *Roohi* above, at paragraph 26).

[37] In this case, the officer found that the applicant's English language proficiency rendered the subsection 76(1) assessment insufficient as an indicator of the applicant's potential to become

economically established in Canada. The officer therefore notified the applicant of his concerns and allowed the applicant to file additional submissions to alleviate them.

[38] It is notable that an officer is under no duty to inform the applicant about any concerns regarding the application that arise directly from the requirements of the legislation or regulations and do not pertain to the veracity of the documents (see *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283, [2006] FCJ No 1597 at paragraphs 23 and 24). The onus is always on the applicant to satisfy the officer of all parts of his application. The officer is under no obligation to ask for additional information where the applicant's material is insufficient (see *Sharma v Canada (Minister of Citizenship and Immigration)*, 2009 FC 786, [2009] FCJ No 910 at paragraph 8; and *Veryamani v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1268, [2010] FCJ No 1668 at paragraph 36). Nevertheless, in this case the officer did provide the applicant with an opportunity to disabuse his concerns.

[39] In response to the officer's concerns, the applicant filed a personal statement on his English language abilities, accounts showing increased settlement funds and proof of his cousin's establishment in Canada. However, the officer found that the additional submissions did not present any new information or evidence that changed his assessment of the file.

[40] The decision clearly indicates that the officer's main concern was the applicant's English language proficiency. Although the applicant stated in his personal statement that all of his regular work was conducted in English, the officer had the applicant's IELTS scores before him that

contradicted this submission. I therefore do not find that the officer erred in not affording much weight to this submission.

[41] With regards to the settlement funds, recent jurisprudence has established that officers are not required to consider these in subsection 76(3) analyses (see *Xu v Canada (Minister of Citizenship and Immigration)*, 2010 FC 418, [2010] FCJ No 483 at paragraph 32; *Philbean* above, at paragraph 19; and *Debnath* above, at paragraph 15). Similarly to *Debnath* above, the question of settlement funds was irrelevant to the officer's main concerns; namely, the applicant's English language proficiency in this case (see *Debnath* above, at paragraphs 13 and 14). I therefore find no error in the officer's assessment of the applicant's settlement funds.

[42] Turning to the applicant's cousin in Canada, the applicant submits that the officer erred by dismissing it on the basis of her salary. The applicant submits that the officer misconstrued the evidence as indicative of the applicant's financial reliance on his cousin rather than as evidence of a home for the applicant and his family to reside in until they became settled in Canada.

[43] I first note that although the applicant criticizes the fact that the officer mentioned the cousin's salary without delving into her husband's employment, the husband's salary was not included in the applicant's submissions. Further and more importantly, the officer's main concern with the applicant's application was his English language proficiency. Therefore, I do not find that the officer erred in finding that the submissions on his cousin did not qualify as new information that would positively impact his concerns. There was nothing to suggest that his cousin would help

him with the English language which, as stated above, was the officer's main concern with the applicant's ability to successfully economically establish in Canada.

[44] Finally, as noted by the applicant, revisions to the Regulations have changed the approach in skilled worker applications from one focused on a specific occupation to one in which greater emphasis is placed on the adaptability of the applicant to becoming economically established in Canada (see *Roohi* above, at paragraph 28). However, contrary to the applicant's submissions, I find that the officer in this case did adopt the broader approach. As mentioned above, the officer explicitly stated in his letter dated March 3, 2011 that:

> I am not satisfied that this level of English competency would facilitate your economic establishment in Canada, as a Financial Manager, or similar, nor am I satisfied that you have otherwise acceptable experience in another field of expertise, found on the NOC list, in which you might reasonably be expected to secure employment. [emphasis added]

[45] This clearly indicates that the officer did not limit his assessment to the applicant's competency in a specific occupation, but rather also considered his adaptability into other fields.

[46] In summary, I find that the officer considered all the evidence before him in exercising his discretion under subsection 76(3) of the Regulations. This evidence included both the applicant's initial application and his subsequent submissions. I find that the officer's decision was transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it. I would therefore dismiss this application.

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

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, SC 2001, c 27

12.(2) A foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada.	12.(2) La sélection des étrangers de la catégorie « immigration économique » se fait en fonction de leur capacité à réussir leur établissement économique au Canada.
(2) The regulations may prescribe, and govern any matter relating to, classes of permanent residents or foreign nationals, including the classes referred to in section 12, and may include provisions respecting	(2) Ils établissent et régissent les catégories de résidents permanents ou d'étrangers, dont celles visées à l'article 12, et portent notamment sur :
(a) selection criteria, the weight, if any, to be given to all or some of those criteria, the procedures to be followed in evaluating all or some of those criteria and the circumstances in which an officer may substitute for those criteria their evaluation of the likelihood of a foreign national's ability to become economically established in Canada;	a) les critères applicables aux diverses catégories, et les méthodes ou, le cas échéant, les grilles d'appréciation et de pondération de tout ou partie de ces critères, ainsi que les cas où l'agent peut substituer aux critères son appréciation de la capacité de l'étranger à réussir son établissement économique au Canada;
72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

Immigration and Refugee Protection Regulations, SOR/2002-227

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

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

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

(i) education, in accordance with section 78,

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

(iii) experience, in accordance with section 80,

(iv) age, in accordance with section 81,

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

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

(b) the skilled worker must

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

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

. . .

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

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

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

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

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

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

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

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

b) le travailleur qualifié :

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

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

. . .

(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) — n'est pas un indicateur suffisant de l'aptitude de ce travailleur qualifié à réussir son établissement économique au Canada, l'agent peut substituer son appréciation aux critères prévus à l'alinéa (1)a).

(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.

FEDERAL COURT

SOLICITORS OF RECORD

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