

Federal Court of Appeal



Cour d'appel fédérale

Date: 20111206

Dockets: A-416-10

A-419-10

A-484-10

Citation: 2011 FCA 339

**CORAM: SHARLOW J.A.
PELLETIER J.A.
STRATAS J.A.**

BETWEEN:

Docket: A-416-10

MD. Ali Khan

Appellant

and

Minister of Citizenship and Immigration

Respondent

BETWEEN:

Docket A-419-10

MD. Khairul Kabir

Appellant

and

Federal Court of Appeal



Cour d'appel fédérale

Minister of Citizenship and Immigration

Respondent

BETWEEN:

Docket A-484-10

Minister of Citizenship and Immigration

Appellant

and

Syed Imam Hasan

Respondent

Heard at Toronto, Ontario, on September 6, 2011.

Judgment delivered at Ottawa, Ontario, on December 6, 2011.

REASONS FOR JUDGMENT BY:

PELLETIER J.A.

CONCURRED IN BY:

SHARLOW J.A.
STRATAS J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] Off-shore applicants for permanent resident visas in the federal skilled worker class are assessed according to a grid system in which points are awarded for various criteria, one of which is education. The *Immigration and Refugee Protection Regulations*, SOR/ 2002-227 (the Regulations), provide a scale for the assessment of educational qualifications based on two criteria, educational credentials and years of full time (or equivalent) study. The issue raised by this appeal is the application of the second of these criteria.

[2] These reasons apply to three appeals which were heard together because they all raise this issue on substantially the same facts. In all three cases, the applicant had earned two master's degrees and had spent more than 17 years in full time studies. In all three cases, the visa officer

refused their application for a permanent resident visa because they were only credited with 16 years of full time studies with respect to their master's degree, one year short of the 17 year requirement for a master's degree stipulated in the Regulations. A judge of the Federal Court dismissed two of the visa applicants' applications for judicial review: *Kabir v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 995, [2010] F.C.J No.1258 [*Kabir*], and *Khan v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 983, [2010] F.C.J. No. 1224 [*Khan*]. A different judge of the Federal Court allowed the third judicial review application: *Hasan v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1206, [2010] F.C.J. No. 1500 [*Hasan*].

[3] In *Kabir* and *Khan*, the following question was certified:

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?

[4] In *Hasan*, the Court certified substantially the same question, but for the inadvertent omission of the words "of full time".

[5] For the reasons that follow, I would answer the question in the negative, dismiss the applicants' appeals in *Kabir* and *Khan*, and allow the Minister's appeal in *Hasan*. To avoid unnecessary repetition of the phrase "the two appellants and the respondent", I will refer to these individuals collectively as the visa applicants.

[6] These reasons are prepared in the *Hasan* file (A-484-10) but apply equally to the *Kabir* (A-416-10) and *Khan* (A-419-10) matters. A copy of these reasons will be placed on each of these files.

THE STATUTORY SCHEME

[7] In order to make sense of the visa officer's decisions, and the Federal Court's reasons in the applications for judicial review, it is necessary to appreciate the statutory scheme.

[8] Sections 73 to 85 of the Regulations establish a grid for the assessment of persons seeking admission to Canada as federal skilled workers. The grid is based on the six criteria listed below; opposite each item is the maximum number of points which may be awarded for that item:

- education – 25 points
- proficiency in English and French – 24 points
- experience – 21 points
- age – 10 points
- arranged employment – 10 points
- adaptability – 10 points

The highest possible score is 100 points.

[9] The assessment of an applicant's educational qualifications is dealt with in subsection 78(2) of the Regulations

78(2) A maximum of 25 points shall be awarded for a skilled worker's education as follows:

78(2) Un maximum de 25 points d'appréciation sont attribués 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 equivalent studies, or

(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

(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

(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

(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.

e) 22 points, si, selon le cas :

(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) 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, 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.

[10] The rules for the assessment of multiple educational qualifications are found at subsections 78(3) and (4) of the Regulations.

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

(i) for the purposes of paragraphs (2)(a) to (d), subparagraph (2)(e)(i) and paragraph (2)(f), on the basis of the

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) 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

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), (2)(d)(i) or (ii) or (2)(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.

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.

[11] The definition of educational credential is found at section 73 of the Regulations.

“*educational credential*” means any diploma, degree or trade or apprenticeship credential 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.

« *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 de tels établissements dans le pays de délivrance de ce diplôme ou certificat.

[12] With these provisions in mind, I turn to the facts underlying these appeals.

FACTS

[13] All three visa applicants are citizens of Bangladesh who applied for permanent resident visas as members of the federal skilled worker class. All have educational credentials awarded by Bangladeshi institutions of higher learning. Mr. Hasan has earned three university degrees: a Bachelor of Commerce, a Master of Commerce in Management and an Executive Master of Business Administration in Marketing. He has completed, in total, at least 18 years of full time education.

[14] Mr. Kabir has to his credit a Bachelor's degree in Political Science, a Master's degree in Political Science, a Master's degree in Business Administration and a Diploma in Fashion Merchandising. Mr. Kabir has completed, in total, 18 years of full time study. While the issue of assessing years of study also arises with respect to Mr. Kabir's wife, the same principles apply to her application. As a practical matter, both of their applications turn on the assessment of Mr. Kabir's years of study.

[15] Mr. Khan holds a Bachelor of Commerce degree, a Master's degree in Accounting, a Master's degree in Business Administration and a Diploma in Computer Application Programming. In total, he has spent 19 years in full time studies.

[16] In each of these cases, the visa officer credited the applicant with 22 points out of a possible maximum of 25 points for educational qualifications. The officer applied the same reasoning in all three cases. Using Mr. Hasan's application as an example, the refusal letter he received from the officer stated:

You obtained 22 points for education based on the evidence that your highest credential is a Master's degree with the equivalent of 16 years of fulltime education leading up to the completion of your highest degree (your 2 Masters [sic] degrees separately), in a recognized post-secondary institution. Note that you cannot cumulate more years of education by having 2 credentials at the same level.

[17] The officer made her reasoning more explicit in the affidavit that she submitted in the course of Mr. Hasan's application for judicial review:

I considered the applicant's education history and concluded that none of his two Masters [sic] Degrees (commerce and business administration) was in the line of progression towards the other. I therefore awarded the maximum points for the years of study leading up to his highest university credential (any of his two Masters [sic] Degrees taken separately) which is 16 years of full time education and I awarded 22 points for education.

[18] The visa officer's reference to one credential as not being in the "line of progression" towards the other is administrative shorthand, meaning that since educational credentials must be assessed on the basis of the applicant's single highest credential (ss. 78(3)(a)), only the years of study required to obtain that credential are considered by the officer. This meant that since one master's degree was not a prerequisite for obtaining the other master's degree, Mr. Hasan was only credited for the years of study required to obtain a single master's degree. The same reasoning was

applied to Mr. Kabir's Diploma in Fashion Merchandising, and to Mr. Khan's Diploma in Application Programming, neither of which was a prerequisite for their respective master's degree.

[19] The 16 years of full time education to which the officer refers in her letter to Mr. Hasan is the time required to complete a master's degree in Bangladesh, according to UNESCO and the Bangladeshi educational authorities. This deference to the national authorities is mandated by the definition of "educational credential" under the Regulations.

[20] The result in Mr. Hasan's case, as in the other two cases, was that he failed to score 67 points, which is the minimum number of points required to be granted a permanent resident visa. In each case, the applicant would have met the 67 point threshold if he had been awarded the maximum 25 points under the education factor. In short, the points awarded for the education factor were determinative of each of these applicants' request for a permanent resident visa.

THE DECISIONS UNDER APPEAL

[21] In *Khan* and *Kabir*, the Federal Court judge held that even though the visa applicants had studied for a total of more than the 17 years stipulated in paragraph 78(2)(f) of the Regulations, the visa officer's decision to consider only the 16 years required to achieve a master's degree in Bangladesh was reasonable. The Federal Court judge found that this result flowed from paragraph 78(3)(a) which provides that education is to be assessed on the basis of a single credential, so that the visa applicants are not entitled to any credit for a second master's degree.

[22] The Federal Court judge declined to follow another decision of the Federal Court, *McLachlan v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 975, [2009] F.C.J. No. 1183 [*McLachlan*] in which it was held that subsection 78(4) of the Regulations required the visa officer to consider whether special circumstances existed and, if they did, to award the number of points corresponding to the educational credential achieved, even if the visa officer considered that the applicant had not completed the required number of years of study. The judge in the *Kabir* and *Khan* cases preferred the interpretation of subsection 78(4) found in *Bhuiya v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 878, [2008] F.C.J. No. 1110 [*Bhuiya*], in which the Federal Court found that subsection 78(4) allowed the visa officer to award an applicant the number of points most closely corresponding to the number of years of full time studies undertaken by the applicant. Thus an applicant who was credited with 16 years of full time studies would be entitled to 22 points, which is the number of points awarded to a person with 15 years of full time studies, the period corresponding most closely to, but not exceeding, the number of years of full time study attributed to the applicant. This is, in fact, the number of points awarded to Messrs. Khan and Kabir by the visa officer.

[23] In *Hasan*, the Federal Court judge declined to follow the reasoning set out in *Khan* and *Kabir*. The judge acknowledged that the “line of progression” analysis employed by the visa officer was an attempt to bring clarity to badly worded regulations. Notwithstanding its laudable purpose, the judge identified the issue as whether this analysis was supported by the language of the Regulations. In the judge’s view, the two factors mentioned in paragraph 78(2)(f) must be read disjunctively so that the years of full time study credited to an applicant are not dependent on a single educational credential. The judge considered that the visa officer was required to assess Mr. Hasan’s application on the basis of the second of his two master’s degrees and to give him credit for

all years of full time study, up to and including the second master's degree. If this were done, Mr. Hasan, while nominally getting credit for a single master's degree (the last), would be granted credit for the time required to obtain two master's degrees and would therefore be entitled to 25 points with respect to the education factor. As a result, the Federal Court judge allowed Mr. Hasan's application for judicial review.

THE QUESTION TO BE DECIDED

[24] I reproduce the certified question for ease of reference:

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?

[25] It is necessary to clarify the question somewhat. Just as points are not awarded for educational credentials alone, nor are they awarded for years of study alone. The question is the relation between the years of study and the educational credential which forms the basis of the assessment. In effect, the issue in this appeal is whether visa officers must only give credit for those years of study which the national authorities identify as the norm for the achievement of the educational credential in issue, or whether officers can recognize other years of study, either under the "line of progression" analysis or on some other basis.

ANALYSIS

[26] 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.

[27] The issue in this case is the construction of subsections 78(2) and (3) of the Regulations. The former is a listing of educational credentials and associated years of full time study, while the latter sets out how those credentials are to be assessed. In particular, subsection 78(3) deals with two questions: which educational credential will form the basis of the assessment, and how are the years of full time (or equivalent) studies to be assessed?

[28] Which credential will form the basis of the assessment? Subparagraphs 78(3)(a) and (b) provide that points shall be awarded on the basis of a single educational credential, specifically, the one which results in the highest number of points.

[29] I note in passing that educational credentials, by themselves, are not a basis upon which points are awarded. They are awarded on the basis of educational credentials and years of study. Thus subparagraph 78(3)(b)(i) must be read as though it said "points shall be awarded on the basis of the single educational credential that results in the highest number of points, assuming that the years of study requirement for that credential have been met".

[30] Paragraph 78(3)(a) provides that points shall not be awarded cumulatively on the basis of more than one single educational credential. I take this to mean three things. First, the points that would be awarded for the prerequisites to an educational credential are not to be added to the points awarded for that credential. This is made clear in the French version of the text, which provides that points are not to be added one to the other on the basis that the applicant holds more than one credential.

[31] For example, admission to a bachelor's level program is normally limited to persons who have a high school diploma. The effect of paragraph 78(3)(a) is that in awarding points for a bachelor's degree, one would not add the points associated with a high school diploma (5 points) to the points awarded for a bachelor's degree (15 to 20 points). To hold otherwise would result in double counting in the sense that the points awarded for the higher credential already account for the fact that one must first obtain the lower credential.

[32] The second point to be taken from paragraph 78(3)(a) of the Regulations is that points are not awarded for multiple instances of the same credential. Thus a person who has two bachelor's degrees would not be entitled to the maximum 25 points on the basis that they were entitled to 20 points for the first bachelor's degree plus 20 points for the second. There is a limited exception to this rule in paragraph 78(2)(e)(ii) to account for certain professional qualifications, such as law, which requires two bachelor's degrees.

[33] Lastly, the fact that the credential which forms the basis of the assessment is the one which yields the highest number of points necessarily means that ancillary or supplementary credentials are not considered. Only the “senior” credential is considered.

[34] This part of the analysis is not contentious. Everyone agrees that a master’s degree is the highest credential possessed by each of these applicants. None of the visa applicants argues that they were entitled to the maximum number of points on the basis that they have two master’s degrees and are thus entitled to double the points awarded for a single master’s degree. They do argue however that they are entitled to the maximum number of points because, in the course of their studies, they accumulated more than the number of years of full time study stipulated in paragraph 78(2)(f) and thus are entitled to the maximum 25 points for their educational qualifications.

[35] This leads to the question of how the years of full time study are to be assessed. The visa officer only credited the visa applicants with 16 years of full time study for a master’s degree because UNESCO and the Bangladeshi educational authorities confirmed that, in Bangladesh, the normal course of studies for a master’s degree is 16 years. The visa officer’s authority to impose this limitation is found in the definition of “educational credential”, quoted above, but reproduced below for ease of reference:

“*educational credential*” means any diploma, degree or trade or apprenticeship credential 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

« *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

institutions in the country of issue.

d'enregistrer, d'accréditer, de superviser et de réglementer de tels établissements dans le pays de délivrance de ce diplôme ou certificat.

[36] The key words in this provision are "... issued on the completion of a program of study or training...". The visa officer is to be guided by the national authorities not only as to the credentials that are recognized in that jurisdiction but also as to the course of studies leading to that credential. As a result, the visa officer was entitled, on the basis of the information provided by UNESCO and confirmed by the Bangladeshi authorities, to credit the visa applicants with 16 years of full time studies with respect to their master's degree.

[37] This takes us to the critical issue in these cases, which is whether the visa applicants are entitled to any credit for years of full time study in excess of the 16 years required to complete a master's degree in their country of origin?

[38] The visa applicants' position is that all full time years of study completed in the successful pursuit of a credential are to be credited to an applicant. In support of this position, they point to the wording of subsection 78(2) of the Regulations in which no causal link is made between the educational credential and the years of full time study. For example, paragraph 78(2)(f) dealing with master's degrees reads:

(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-

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

time equivalent studies.

temps plein complètes ou l'équivalent
temps plein.

[39] The visa applicants point out that the Minister's position requires one to treat the provision as though it reads: "...master's or doctoral level *requiring* a total of at least 17 years ...". If Parliament has chosen not to use those words, they say, the Court should not read them in.

[40] The visa applicants' position amounts to saying that while points will be awarded solely on the basis of a single educational credential, the time spent acquiring other educational credentials is to be considered even if the other credentials themselves are not.

[41] The difficulty with this position is that it too requires reading a number of limitations into the statutory language. For example, the visa applicants conceded in argument that a year of full time studies which resulted in a failure, i.e. which did not advance the student's candidacy for a particular educational credential, would not be considered a year of full time studies. So, for example, a candidate for a master's degree who had to repeat a year would not be able to count that year as a year of full time studies. While this is a sensible position, it is an implied limitation on the otherwise unqualified words used in subsection 78(2).

[42] Another implied limitation may well arise in relation to years spent in a program of study which is later abandoned. For example, if a candidate begins a master's program in engineering, successfully completes one year of studies in that program and then switches to an unrelated field, the inclusion of that year of studies in the assessment of the candidate's education would give the

candidate credit for a year of studies which was unrelated to any educational credential. This cannot have been Parliament's intention.

[43] In the end, the language used in relation to the years of study requirement is ambiguous and requires the Court to read in limitations, no matter which position is adopted. The question is: which limitations are more consistent with the statutory objectives?

[44] In my view, the requirement that a candidate's assessment be based upon a single credential together with the prohibition on cumulating points suggests that Parliament wished to standardize the assessment of educational credentials, so that the relevant period is the number of years of full time study (or equivalent) required to obtain the candidate's highest education credential in the ordinary course. In that way, all applicants being assessed for a particular educational credential are assessed on the same basis, no matter where they obtained that credential.

[45] This was the view taken by the Federal Court in *Bhuiya*, cited above, at paras. 15 -19:

15 Such an interpretation of the Regulations is consistent with both the Immigration Manual, and the policy objectives described in the Regulatory Impact Assessment Statement or "RIAS" relating to the Regulations.

16 Dealing first with the RIAS, this Court has held that although a RIAS is not a part of Regulations, it is nonetheless a useful tool in analyzing the legislative intent, as it was prepared as part of the regulatory process: see, for example, *Merck & Co. v. Canada (Attorney General)* (1999), 176 F.T.R. 21 (F.C.T.D.) and *Bayer Inc. v. Canada (Attorney General)* (1999), 87 C.P.R. (3d) 293 (F.C.A.).

17 In this case, a review of the RIAS discloses that the reason for requiring that a candidate have both a particular degree and a specified number of years of education was to promote consistent standards in the assessment of a candidate's education and training, given the range of education and formal training systems around the world.

18 The RIAS uses a Master's degree as an example, noting that to qualify for the maximum number of points for a Master's the candidate must also have 17 years of education. In other words, the years of education requirement is clearly intended to establish minimum standards for each type of degree.

19 The fact that Ms. Bhuiya may have spent one additional year in school after obtaining her Master's degree does not turn her 16 year Master's degree into a 17 year Master's degree.

[46] See, to the same effect, *Thomasz v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1159, [2010] F.C.J. No. 1443, at paras. 24-25.

[47] In *Hasan*, the Federal Court judge rejected the reasoning in *Bhuiya*, preferring instead the approach adopted in *McLachlan*, cited above. In that case, the Federal Court judge resolved the issue of years of study by reference to subsection 78(4) of the Regulations which I reproduce below for ease of reference:

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.

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.

[48] *McLachlan* involved a visa applicant with "Scottish Ordinary Grades" plus 2 years of post-secondary police training. The national standard time for completion of Scottish Ordinary Grades was 11 years, but the applicant had repeated the final year in order to achieve higher marks. As a result, he had in fact studied for 12 years at the secondary school level. The visa officer awarded 15 points for education pursuant to subparagraph 78(2)(c)(i), which required "a total of at least 13 years of completed full-time or full-time equivalent studies". The applicant claimed to be entitled to 20 points pursuant to subparagraph 78(2)(d)(i), which required "a total of at least 14 years of completed full-time or full-time equivalent studies". The Federal Court judge set aside the visa officer's assessment, reasoning as follows:

31 The Immigration Officer did not look beyond the words of subsection 78(2)(c) and (d) and consider all of section 78 of the Regulations or indeed the scheme of the skilled worker provisions. Her analysis focused on a tallying of effective years of studies without regard to the level of educational attainment. Educational attainment is usually, but not always, achieved by methodical progression of years of study. The legislators were alive to the possibility of a shortfall in years of study in situations where the educational credential is valid and that special circumstance was addressed in subsection 78(4) of the IRPA Regulations.

32 The subsection could be better worded; nevertheless it is sufficiently clear. Stripping out the wordage unrelated to the Applicant, it reads:

- ... if a skilled worker has an educational credential referred to in ... subparagraph ... (d)(i) ... but not the total number of years of full-time ... studies required by that ... 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 subparagraph.

33 The trigger for Section 78(4) is the attainment of an educational credential. The special circumstances subsection recognizes the educational attainment of skilled workers with bona fide educational credentials but not the specified years of study. Special circumstances could include those who attended state educational systems with shorter primary and secondary programs than in Canada.

[49] The result was that the applicant who had an educational credential but lacked the required number of years of completed studies applicable to that credential was nonetheless granted the full point allocation for that credential as though he satisfied the years of study requirement.

[50] 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.

[51] 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 for 14 years of full time studies) or a three year post secondary educational credential (22 points for 15 years of full time studies).

[52] 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 disposition, 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.

[53] 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.

[54] If this is correct, then the "line of progression" analysis employed by visa officers may not respect the statutory scheme. For ease of reference, I reproduce below the comments made by the visa officer in the affidavit she submitted for the purposes of Mr. Hasan's application for judicial review of her decision:

I considered the applicant's education history and concluded that none of his two Masters [sic] Degrees (commerce and business administration) was in the line of progression towards the other. I therefore awarded the maximum points for the years of study leading up to his highest university credential (any of his two Masters [sic] Degrees taken separately) which is 16 years of full time education and I awarded 22 points for education.

This suggests that if the visa officer had found that one of Mr. Hasan's master's degrees had been "in the line of progression" towards the other, Mr. Hasan would have been given additional credit

for his years of education. If I have understood the visa officer's reasoning correctly, I must say that it is mistaken. Just as one does not get additional credit for having completed high school before obtaining a bachelor's degree, the twelve years spent completing high school cannot be added to the years of study associated with a bachelor's degree on the basis a high school diploma is in the line of progression towards a bachelor's degree. The years of study required to obtain a pre-requisite to a degree are already included in the years of study associated with that degree in the Regulations. Thus the 17 years of full time study associated with a master's degree in paragraph 78(2)(f) include the full time years of study spent acquiring the pre-requisites for that degree. No further credit is available for years of study in the "line of progression" towards that degree.

[55] In the case of these visa applicants, the visa officer found, in each case, that their application was to be assessed on the basis of a single master's degree. The visa officer held that, based on the information provided by UNESCO and the national authorities that the normal course of studies for a master's degree in Bangladesh is 16 years. In each case, the visa officer concluded that the time spent acquiring the visa applicants' other credentials was not to be included in the calculation of the appellant's years of full time studies because none of those other credentials were pre-requisites to the appellant's master's degree. The visa officer's reference to the "line of progression" analysis made no difference in the result. As a result, I find that the visa officer committed no error in the assessment of the visa applicant's education for the purposes of section 78 of the Regulations.

CONCLUSION

[56] In the result, I would dismiss the appeal in *Khan* and *Kabir* and I would allow the Minister's appeal in *Hasan*. I would answer the certified question as follows:

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 did not contribute to the educational credential being assessed. That is, visa officers must give credit only for those years of study which the national authorities identify as the norm for the achievement of the educational credential in issue.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-416-10

APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAME JUSTICE HENEGAN OF THE FEDERAL COURT DATED OCTOBER 1, 2010, DOCKET NUMBER IMM-1196-10.

STYLE OF CAUSE:

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 6, 2011

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: SHARLOW J.A.
STRATAS J.A.

DATED: December 6, 2011

APPEARANCES:

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-419-10

APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAME. JUSTICE HENEGAN OF THE FEDERAL COURT DATED OCTOBER 1, 2010, DOCKET NUMBER IMM-1291-10.

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CONCURRED IN BY: SHARLOW J.A.
STRATAS J.A.

DATED: December 6, 2011

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-484-10

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CONCURRED IN BY: SHARLOW J.A.
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