

Federal Court



Cour fédérale

Date: 20101119

Docket: IMM-5481-09

Citation: 2010 FC 1159

Ottawa, Ontario, November 19, 2010

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

**HANS WILHEM THOMASZ
SHIROMI PERERA
AYDEN KEON JEREMIAH PERERA**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Hans Wilhem Thomasz (the “Principal Applicant”), Shiromi Perera, and Ayden Keon Jeremiah Perera (the “Applicants”), seek judicial review of a decision of a Visa Officer (the

“Officer”) denying him a permanent resident visa, as a skilled worker, pursuant to the provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the “Regulations”).

[2] The Principal Applicant applied for permanent resident status as a “skilled worker”.

Pursuant to subsection 76(2) of the Regulations, a skilled worker must obtain a minimum number of points, as established by the Minister of Citizenship and Immigration (the “Respondent”), in order to be eligible for entry into Canada. At the time of the Principal Applicant’s application, the number of points was fixed at 67. He obtained a total of 65 points, from a maximum available of 100 points.

[3] The Principal Applicant claimed to have completed 19 years of full-time education, consisting of 5 years of elementary school, 7 years of secondary school and 7 years of post-secondary education. He was given 15 points for his education. The Principal Applicant included the following information about his education, with his application:

From	To	Institution	Course / Level
1980	1992	St. Benedict’s College	High School
1990	1992	IDM Computer Studies	Post-secondary diploma
1995	1999	Technical Engineering College	Post-secondary diploma
1999	2000	National Institute of Information Technology	Post-secondary diploma
2001	2002	Turnkey Computer System	Post-secondary diploma

[4] The Computer Assisted Immigration Processing System (“CAIPS”) shows that the only “recognized” post-secondary institution attended by the Principal Applicant was IDM Computer Studies. He completed the two year diploma at this institution while he was still attending secondary school.

[5] The Principal Applicant had submitted a diploma, awarding a Master of Science degree.

When the Officer sought further information about this degree, the Applicants’ consultant indicated

that the Principal Applicant does not hold a master's degree and that the document had been submitted in error.

[6] The Officer requested further documentation in 2008. The requested material was submitted on December 29, 2008. On January 26, 2009, the Officer requested more documentation, including transcripts for all post-secondary courses undertaken by the Principal Applicant. This material was submitted on March 19, 2009.

[7] The Applicants' application was rejected on September 16, 2009. Subsequently, the Applicants' immigration consultant sent in further submissions, including transcripts and the curricula from the programs the Principal Applicant attended. The consultant also explained that since the Principal Applicant had a two year educational credential, he was entitled to all of the points associated with the educational credential, even without the necessary number of years.

[8] By letter dated November 4, 2009, the Second Secretary (Immigration) of the High Commission of Canada in London, United Kingdom, confirmed that the Officer's assessment was correct and refused to consider any documentation that was submitted after the decision of September 16, 2009.

[9] Two issues are raised in this application for judicial review:

- a. Did the Officer breach the duty of fairness by not giving the Applicants the opportunity to address concerns about his education; and

- b. Did the Officer commit an error in law by awarding the Principal Applicant only 15 points for his education?

[10] According to the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, decisions of statutory decision-makers are reviewable on one of two standards, that is the standard of correctness or the standard of reasonableness.

[11] Questions of procedural fairness are subject to review on the standard of correctness. Questions of fact and questions of mixed fact and law are subject to review on the standard of reasonableness. This application raises a question of mixed fact and law, that is the assessment of the Principal Applicant's education against the criteria set out in the Regulations, and will be reviewed on the standard of reasonableness.

[12] The Applicants argue that a breach of procedural fairness arose because the Officer did not give them notice, that is a "fairness" letter advising that some of the Principal Applicant's post-secondary qualifications were not "academic credentials". They argued that if he had known that the Officer believed that only one of his diplomas qualified, the Principal Applicant could have submitted additional evidence to address this concern.

[13] In my opinion, the Applicants have failed to show that a breach of procedural fairness occurred.

[14] The purpose of a “fairness” letter is to inform an applicant of the case to be met. In this case, the criteria to be met are set out in the Regulations. Section 73 defines an educational credential as follows:

73. The following definitions apply in this Division, other than section 87.1.	73. Les définitions qui suivent s’appliquent à la présente section, à l’exception de l’article 87.1.
“educational credential”	« ancien règlement »
« diplôme »	“former 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.	« ancien règlement » S’entend au sens du paragraphe 316(1).
“former Regulations”	« diplôme »
« ancien règlement »	“educational credential”
“former Regulations” has the same meaning as in subsection 316(1).	« 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.
“restricted occupation”	« profession d’accès limité »
« profession d’accès limité »	“restricted occupation”
“restricted occupation” means an occupation designated as a restricted occupation by the Minister, taking into account labour market activity on both	« profession d’accès limité » Toute profession désignée comme telle par le ministre en fonction de l’activité sur le marché du travail aux niveaux

an area and a national basis, following consultation with the Department of Human Resources Development, provincial governments and any other relevant organizations or institutions.

national et régional, après consultation du ministère du Développement des ressources humaines, des gouvernements provinciaux et de toute autre organisation ou institution compétente.

[15] The Principal Applicant submitted his applications in 2006. All of his post-secondary training, as listed in that application, was completed by 2002. However, in the covering letter that accompanied his application, the consultant noted that the Principal Applicant had a “two year diploma in computers, further complimented (*sic*) by a high diploma in computer programming”. As well, when projecting the points for which the consultant believed the Principal Applicant to be eligible, the consultant indicated 20 points based on a two year diploma.

[16] In response to the request from the Officer for further information, the consultant submitted further material on December 29, 2008. In that letter, the consultant continued to emphasize the two year diploma.

[17] The only two year diploma held by the Principal Applicant was from IDM Computer Studies, the only recognized institution. That diploma was completed in 1992. The reliance by the Principal Applicant, and his consultant, on the two year diploma and not on the later four year diploma, suggests that the Principal Applicant knew that the other diplomas did not meet the regulatory requirements.

[18] Since the Principal Applicant was aware that the Regulations required the educational credential issue from a recognized institution and further, that he knew that his diplomas did not

qualify, he cannot claim a breach of procedural fairness resulting from the failure to give him notice of concerns about his educational qualifications. I am satisfied that no breach of procedural fairness occurred in the present case.

[19] The Principal Applicant also submitted that the Officer erred in law in only awarding him 15 points, not the 20 points calculated by the consultant. Subsection 78(2) of the Regulations sets out the selection grid for education. The paragraphs that are relevant to this discussion are paragraphs 78(2)(b) to (d), inclusive, which provide as follows:

Education (25 points)	Études (25 points)
78 (2) A maximum of 25 points shall be awarded for a skilled worker's education as follows: ...	(2) Un maximum de 25 points d'appréciation sont attribués pour les études du travailleur qualifié selon la grille suivante : ...
(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,

<p>(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;</p>	<p>(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;</p>
<p>(d) 20 points for</p> <p>(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</p> <p>(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;</p>	<p>d) 20 points, si, selon le cas :</p> <p>(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,</p> <p>(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;</p>

[20] The Officer found that the Principal Applicant held a two year post-secondary diploma but had completed only 13 years of education. Pursuant to the application of paragraph 78(2)(c), the Principal Applicant was entitled to be awarded 15 points.

[21] The Applicants argue that subsection 78(4) provides that where he has an educational credential but not the requisite number of years, he is entitled to the points for that credential.

Subsection 78(4) is as follows:

<p>Special circumstances</p> <p>(4) For the purposes of</p>	<p>Circonstances spéciales</p> <p>(4) Pour l'application du</p>
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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.

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.

[22] The Applicants rely on the decision in *McLachlan v. Canada (Minister of Citizenship and Immigration)* (2009), 354 F.T.R. 176 (FC), arguing that *McLachlan* supports his interpretation. The same argument was made in the recent cases of *Kabir v. Canada (Citizenship and Immigration)*, 2010 FC 995, and *Khan v. Canada (Citizenship and Immigration)*, 2010 FC 983, and was rejected.

[23] In *McLachlan*, this Court held that subsection 78(4) is engaged where an individual has attained an academic credential but not the specified years of study. If adequate special circumstances exist the applicant should be awarded the number of points corresponding to the academic credential attained, notwithstanding that the applicant has not completed the specified years of study. The application was allowed due to the officer's failure to consider the special circumstances of that case.

[24] This Court in *Bhuiya v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 878, decided that where an applicant has achieved an academic credential in less years than specified,

subsection 78(4) allowed an Officer to award points corresponding to the number of years of education, not the full points of the level of the academic credential attained. That is, subsection 78(4) cannot be used to award an applicant full points for an academic credential in special circumstances notwithstanding that he or she has not completed the requisite years of study.

[25] In my opinion, the approach taken by Justice Mactavish in *Bhuiya* is preferable. In adopting that interpretation, I must depart from the decision in *McLachlan*. In *Arias v. Canada (Citizenship and Immigration)* (2009), 86 Imm. L.R. (3d) 1 (FC), I referred to the principle of judicial comity as follows:

[20] I am mindful that the principle of judicial comity must be taken into account when a judge of the Court purports to depart from a prior decision of the Court. In this regard, I refer to the decision in *Almrei v. Canada (Citizenship and Immigration)* (2007), 316 F.T.R. 49 at paras. 61 and 62 where Justice Lemieux said the following about judicial comity:

(3) The principle of judicial comity

61 The principle of judicial comity is well-recognized by the judiciary in Canada. Applied to decisions rendered by judges of the Federal Court, the principle is to the effect that a substantially similar decision rendered by a judge of this Court should be followed in the interest of advancing certainty in the law....

62 There are a number of exceptions to the principle of judicial comity as expressed above they are:

1. The existence of a different factual matrix or evidentiary basis between the two cases;
2. Where the issue to be decided is different;
3. Where the previous condition failed to consider legislation or binding authorities that would have produced a different result, i.e., was manifestly wrong; and

4. The decision it followed would create an injustice [citations omitted].

[26] In my opinion, the first and third exceptions from *Almrei* apply here. The Applicants have not put forward any special circumstances that the Officer failed to consider.

[27] The third exception from *Almrei* is particularly relevant.

[28] This Court's decision in *McLachlan* is precluded by the holding in *Bhuiya*, which was rendered before *McLachlan*.

[29] Following the approach consistent with *Bhuiya*, the Officer reasonably applied subsection 78(4) in this case. In the result, this application for judicial review is dismissed. No basis for judicial intervention has been shown.

[30] Counsel for the parties have jointly proposed the following question for certification:

When a skilled worker visa applicant has achieved an educational credential referred to in a particular subparagraph in Regulation 78(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 but not the total number of years of study required by that subparagraph, does section 78(4) require the visa officers to award the number of points based on the applicant's highest educational credential or based on the applicant's years of study?

[31] The test for certification is whether the case raises a question of general importance which would be dispositive of an appeal; see *Canada (Minister of Citizenship and Immigration) v. Zazai* (2004), 247 F.T.R. 320 (F.C.A.).

[32] Since the cases dealing with this issue are at odds, the question posed is one of general importance, and would be dispositive of an appeal.

ORDER

THIS COURT ORDERS that this application for judicial review is dismissed and the following question is certified:

When a skilled worker visa applicant has achieved an educational credential referred to in a particular subparagraph in Regulation 78(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 but not the total number of years of study required by that subparagraph, does section 78(4) require the visa officers to award the number of points based on the applicant's highest educational credential or based on the applicant's years of study?

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5481-09

STYLE OF CAUSE: HANS WILHEM THOMASZ, SHIROMI PERERA,
AYDEN KEON JEREMIAH PERERA v.
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, ON

DATE OF HEARING: June 22, 2010

**REASONS FOR ORDER
AND ORDER:** HENEGHAN J.

DATED: November 19, 2010

APPEARANCES:

Clare Crummey
Lorne Waldman

FOR THE APPLICANTS

Marina Stefanovic

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lorne Waldman
Barrister and Solicitor
Toronto, ON

FOR THE APPLICANTS

Myles J. Kirvan
Deputy Attorney General of Canada
Toronto, ON

FOR THE RESPONDENT