Federal Court  Cour fédérale

Date: 20150630

Docket: IMM-6022-14

Citation: 2015 FC 811

Ottawa, Ontario, June 30, 2015

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

DEEPIKA SAMANTHI WIJAYANSINGHE UTHUWAN PATHIRANNAHELAGE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision of a visa officer [the Officer] dated May 29, 2014 refusing Ms. Pathirannahelage's application for permanent residence in Canada under the Federal Skilled Worker [FSW] class [the Decision].

[2] Ms. Pathirannahelage alleges that, in rendering his Decision, the Officer breached the principles of natural justice by failing to properly advise her that he was contemplating making a "negative substituted evaluation" in her case, and that such evaluation of her application was unreasonable.

[3] For the reasons detailed hereafter, the application for judicial review is dismissed.

II. Facts

[4] The applicant Ms. Pathirannahelage is a physiotherapist from Sri Lanka who has been working for the Ministry of Health in Sri Lanka since January 2005. On August 24, 2013, Ms. Pathirannahelage applies for permanent residence in Canada under the FSW category at the Canadian immigration office in Colombo, Sri Lanka, and she hires an immigration consultant to assist her with the application. She provides the consultant's mailing address and email address as part of her contact information.

[5] According to the Officer's notes in the Global Case Management System [GCMS], a visa officer in the Colombo office reviews Ms. Pathirannahelage's file on December 2, 2013, noting that she appears to meet the minimum requirements for work experience, language, and education. Following a letter requesting Ms. Pathirannahelage to attend an interview in order to assess her compliance with the eligibility and admissibility requirements for immigration to Canada, an interview is held with her on March 10, 2014.

[6] There is some contradictory evidence as to what exactly is discussed at this interview. Ms. Pathirannahelage states in her affidavit that the Officer does not tell her at the time that he is considering a negative substituted evaluation of her case. According to the Officer's notes, however, Ms. Pathirannahelage is interviewed at length with respect to her work experience and on the fact that she does not have the educational requirements for the occupation of physiotherapist in Canada. The Officer also expresses his concerns about Ms. Pathirannahelage's ability to become economically established in Canada, as Ms. Pathirannahelage says in the interview that she has not done any research about Canada except for the fact that her consultant has mentioned that Saskatoon offers opportunities and that it is not too cold. The Officer also observes that Ms. Pathirannahelage has several friends in Canada but has not drawn on those resources.

[7] The Officer's notes conclude that, even though Ms. Pathirannahelage may meet the experience component of the FSW eligibility criteria, he is not satisfied that, absent the minimum educational requirements, she will be able to successfully establish in Canada. The Officer thus decides to allow Ms. Pathirannahelage to address these concerns in writing.

[8] A letter [the procedural fairness letter] is sent by the Officer on March 13, 2014, informing Ms. Pathirannahelage that he is not satisfied about her ability to become economically established in Canada. In the letter, the Officer notes in particular that Ms. Pathirannahelage has done very little research into her settlement and employment prospects, and that a physiotherapist requires a degree in physiotherapy as well as a license or registration with a regulatory body in order to be able to practice. The Officer therefore requests a settlement plan

and proof that Ms. Pathirannahelage will be able to overcome the lack of relevant degree and licensing/registration requirements. The procedural fairness letter further informs Ms. Pathirannahelage that the Officer can substitute his evaluation of her likely ability to become economically established in Canada if the number of points awarded under the FSW class is considered not to be a sufficient indicator of such ability.

[9] The letter gives Ms. Pathirannahelage 30 days to submit additional information, warning that failure to respond will result in her application being assessed on the information currently on file and may lead to a refusal of the application. Ms. Pathirannahelage states in her affidavit that neither she nor her immigration consultant ever received this procedural fairness letter, neither by post nor by email. In his affidavit, the Officer says it was sent to the address provided by Ms. Pathirannahelage in her application.

[10] On April 17, 2014, the Officer notes that a response has not been received to the procedural fairness letter. On April 28, 2014, the Officer repeats in the GCMS notes the concerns about Ms. Pathirannahelage's ability to establish in Canada and, given that she has not responded to the procedural fairness letter, he requests the opinion of a second officer for concurrence in the application of a negative substituted evaluation.

III. Decision under Review

[11] In the Decision, the Officer finds that Ms. Pathirannahelage does not meet the requirements for permanent residence in Canada. Although she has obtained the minimum points required under the FSW class, the Officer is not satisfied that the points are an accurate indicator

of the likelihood of her ability to become economically established in Canada. He notes that Ms. Pathirannahelage has been given an opportunity to address these concerns at her interview and through the procedural fairness letter, but that she did not respond directly to those concerns. The Officer therefore refuses the application.

[12] In the GCMS notes, which form part of the reasons for the Decision, the second officer reports that Ms. Pathirannahelage has been interviewed and failed to satisfy the Officer that she would successfully become economically established. The second officer notes there is no response to the procedural fairness letter sent to Ms. Pathirannahelage providing her with an opportunity to respond with a settlement plan, and that evidence on file suggests there has been no difficulty in communicating with her consultant. The second officer therefore concurs with the conclusion of the Officer deciding to set aside the points established in the application and, by negative substitution of evaluation, determining that Ms. Pathirannahelage did not meet the eligibility requirements for permanent residency.

IV. Issues

[13] This application for judicial review raises two questions:

- Did the Officer breach the principles of natural justice by failing to advise Ms. Pathirannahelage that he was considering exercising his discretion to make a negative substituted evaluation in this case?

- Did the Officer err by making an unreasonable determination of a negative substituted evaluation in the case?

V. Relevant Provisions

[14] The legislative provisions relevant to this application for judicial review are found in sections 11 and 12 of the IRPA and, more particularly, in the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations]. The relevant provisions of the Regulations read as follows:

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:	76. (1) Les critères ci-après indiquent que le travailleur qualifié peut réussir son établissement économique au Canada à titre de membre de la catégorie des travailleurs qualifiés (fédéral) :
(a) the skilled worker must be awarded not less than the minimum number of required points referred to in subsection (2) on the basis of the following factors, namely,	a) le travailleur qualifié accumule le nombre minimum de points visé au paragraphe (2), au titre des facteurs suivants :
(i) education, in accordance with section 78,	(i) les études, aux termes de l'article 78,
(ii) proficiency in the official languages of Canada, in accordance with section 79,	(ii) la compétence dans les langues officielles du Canada, aux termes de l'article 79,

(iii) experience, in accordance with section 80,

(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 one half of 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 points under paragraph 82(2)(a), (b) or (d) for arranged employment, as defined in subsection 82(1), in Canada.

(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.

(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 et disponibles — 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 des points aux termes des alinéas 82(2)a), b) ou d) pour un emploi réservé, au Canada, au sens du paragraphe 82(1).

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.

[…]

80. (1) Points shall be awarded, up to a maximum of 15 points, to a skilled worker for full-time work experience, or the equivalent in part-time work, within the 10 years before the date on which their application is made, as follows:

(a) 9 points for one year of work experience;

(b) 11 points for two to three years of work experience;

(c) 13 points for four to five years of work experience; and

(d) 15 points for six or more years of work experience.

(2) For the purposes of subsection (1), points are awarded for work experience in occupations, other than a restricted occupation, that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the National Occupational Classification matrix.

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

[…]

80. (1) Un maximum de 15 points d'appréciation sont attribués au travailleur qualifié en fonction du nombre d'années d'expérience de travail à temps plein, ou l'équivalent temps plein pour un travail à temps partiel, au cours des dix années qui ont précédé la date de présentation de la demande, selon la grille suivante :

a) 9 points, pour une année d'expérience de travail;

b) 11 points, pour deux à trois années d'expérience de travail;

c) 13 points, pour quatre à cinq années d'expérience de travail;

d) 15 points, pour six années d'expérience de travail et plus.

(2) Pour l'application du paragraphe (1), des points sont attribués au travailleur qualifié à l'égard de l'expérience de travail dans toute profession ou tout métier appartenant aux genres de compétence 0 Gestion ou niveaux de compétences A ou B de la matrice de la *Classification nationale des professions* — exception faite des professions d'accès limité.

(3) For the purposes of subsection (1), a skilled worker is considered to have experience in an occupation, regardless of whether they meet the employment requirements of the occupation as set out in the occupational descriptions of the National Occupational Classification, if they performed	(3) Pour l'application du paragraphe (1), le travailleur qualifié, indépendamment du fait qu'il satisfait ou non aux conditions d'accès établies à l'égard d'une profession ou d'un métier figurant dans les description des professions de la *Classification nationale des professions*, est considéré comme ayant acquis de l'expérience dans la profession ou le métier :
(a) the actions described in the lead statement for the occupation as set out in the occupational descriptions of the National Occupational Classification; and	a) s'il a accompli l'ensemble des tâches figurant dans l'énoncé principal établi pour la profession ou le métier dans les descriptions des professions de cette classification;
(b) at least a substantial number of the main duties of the occupation as set out in the occupational descriptions of the National Occupational Classification, including all the essential duties.	b) s'il a exercé une partie appréciable des fonctions principales de la profession ou du métier figurant dans les descriptions des professions de cette classification, notamment toutes les fonctions essentielles.

VI. Submissions of the Parties

[15] Ms. Pathirannahelage first submits that the Officer breached the principles of natural justice and his duty to act fairly. In particular, she affirms that visa officers have a duty to give applicants an opportunity to answer the specific case against them. Ms. Pathirannahelage alleges that she was not provided with such a reasonable opportunity to respond to the Officer's concerns as she was not advised at the interview that the Officer was considering making a "substituted negative evaluation". Had she been advised of this, she could have provided the Officer with information alleviating the Officer's concerns.

[16] Furthermore, Ms. Pathirannahelage claims that her consultant never received the procedural fairness letter, by post or by email. She submits that where an Officer cannot prove, on a balance of probabilities, that the communication was sent, the visa office must bear the risk of such failure of communication. Ms. Pathirannahelage points out that the affidavit of the Officer does not provide direct evidence that the procedural fairness letter was sent, as the Officer relied on an administrative document (the correspondence tab) that lacks sufficient detail and that this correspondence tab contained no entry showing how the letter was sent as the column titled "via" was left blank. Ms. Pathirannahelage further observes that a different employee at the Colombo visa office had actually sent the procedural fairness letter.

[17] The Respondent replies that, at the interview, the Officer did properly inform Ms. Pathirannahelage of his concerns about her ability to economically establish in Canada, and that the procedural fairness letter was sent to the address provided by Ms. Pathirannahelage. The Respondent submits that, once the Minister has proven that a communication was properly sent, an applicant bears the risk involved in failure to receive the communication. The Minister does not have to confirm or prove that an applicant actually received the communication.

[18] The Respondent adds that the Officer's affidavit explains what is the normal practice for sending such letters and that there was no reason why he would have deviated from this routine in this case. The Respondent further points out that a copy of the dated procedural fairness letter was put on file, thus indicating it was properly sent since, in the normal course of business, a dated letter would not be put on file unless it was sent. Furthermore, the empty blank space in the "via" column of the correspondent tab was merely an administrative error; the Respondent points

out that the Decision had a similar blank space in that "via" column, yet there is no dispute that such refusal letter was sent to and received by Ms. Pathirannahelage.

[19] Ms. Pathirannahelage also submits that the Officer acted unreasonably in making a negative substituted evaluation in this case, and that the Officer's true underlying concern was the fact that she did not have the minimum educational requirements under the IRPA. Ms. Pathirannahelage claims that such an approach is contrary to subsection 80(3) of the Regulations, as an applicant is not required to demonstrate that he or she has the required education to practice her profession in Canada. In fact, neither the IRPA nor the Regulations require an applicant to work in the specific field in which he or she would be eligible to come to Canada.

[20] The Respondent affirms in response that an applicant's ability to work in the field for which he or she is eligible to come to Canada is a relevant, although not determinative, factor that may be considered in a substituted evaluation, and it was therefore reasonable for the Officer to consider Ms. Pathirannahelage's inability to work as a physiotherapist in Canada. The Respondent further submits that a substituted evaluation under subsection 76(3) of the Regulations does not need to adhere to the strict parameters of the point system criteria outlined in subsection 76(1), and that the purpose of the substituted evaluation provision is to build flexibility in the FSW class.

[21] The Respondent points out that the procedural fairness letter shows that the Officer was open to the possibility that Ms. Pathirannahelage could establish herself in Canada even if she could not work as a physiotherapist, and indeed the Officer had requested a plan from her to

demonstrate her ability to establish herself in Canada, absent an ability to work as a physiotherapist. The Respondent therefore submits that the Officer's decision to consider conducting a negative substituted evaluation was reasonable.

VII. Analysis

A. *The applicable standard of review*

[22] The question of whether there was a breach of procedural fairness is reviewable on a standard of correctness and, as a result, the decision-maker is owed no deference (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*]; *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Singh v Canada (Citizenship and Immigration)*, 2012 FC 855 at para 24).

[23] I note that recent cases decided by this Court have raised the issue of whether questions of procedural fairness require a standard of review analysis at all, given that the question can be phrased as to whether the procedure used was fair or not. Notwithstanding these discussions, the Court has regularly continued to apply the standard of correctness to questions of procedural fairness in cases involving applications for permanent residence (*Asoyan v Canada (Minister of Citizenship and Immigration)*, 2015 FC 206 at para 15 [*Asoyan*]; *Parveen v Canada (Minister of Citizenship and Immigration)*, 2015 FC 473 at para 13; *Gharialia v Canada (Minister of Citizenship and Immigration)*, 2013 FC 745 at para 13 [*Gharialia*]; *Sharma v Canada (Minister of Citizenship and Immigration)*, 2011 FC 337 at para 15 [*Sharma*]; *Yazdani v Canada (Minister of Citizenship and Immigration)*, 2010 FC 885 at paras 24-25 [*Yazdani*]).

[24] While no deference is owed to officers on this issue, the content of the duty of procedural fairness is flexible and may differ with the context. Furthermore, as stated in *Gharialia* at para 16, the duty of procedural fairness for visa officers is at the low end of the spectrum and there is no obligation to provide applicants with an opportunity to address any concerns when the supporting documents are incomplete, unclear or insufficient to satisfy the officer that the applicant meets the requirements.

[25] With regards to the Officer's negative substituted evaluation, it has been established that the standard of review for such decisions made by visa officers is reasonableness (*Gharialia* at para 11; *Uddin v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1005 at para 30 [*Uddin*]; *Sharma* at paras 13-14; *Roohi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1408 at para 11 [*Roohi*]). Because visa officers have specialized expertise in making decisions relative to the issuance of visas and to applicants' eligibility for permanent residence in Canada, such expertise attracts a high degree of deference, especially since determining whether an applicant has demonstrated his or her ability to become economically established is a very fact-driven exercise (*Shirazi v Canada (Citizenship and Immigration)*, 2012 FC 306 at para 15; *Philbean v Canada (Minister of Citizenship and Immigration)*, 2011 FC 487 at para 8; *Khan v Canada (Minister of Citizenship and Immigration)*, 2009 FC 302 at para 10 [*Khan*]).

[26] When reviewing a decision on a standard of reasonableness, the Court must be concerned with the existence of justification, transparency and intelligibility within the decision-making process. Findings involving questions of facts or mixed fact and law should not be disturbed provided that the decision "falls within a range of possible, acceptable outcomes which are

defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 45, 47-48 [*Dunsmuir*]). In conducting a reasonableness review of factual findings, it is not the role of the Court to reweigh the evidence or the relative importance given by the immigration officer to any relevant factor (*Dunsmuir* at para 47; *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at para 99).

B. *Did the Officer breach his duty of procedural fairness?*

[27] The first issue in the present case is whether the Officer breached procedural fairness by failing to properly inform Ms. Pathirannahelage of his concerns on her ability to economically establish and about a possible negative substituted evaluation, or because the procedural fairness letter might not have been received by Ms. Pathirannahelage. Based on the evidence on the record, I do not find any breach of procedural fairness in this case: the Officer ensured that Ms. Pathirannahelage was made aware of the case against her and the procedural fairness letter was correctly sent to Ms. Pathirannahelage by the Officer.

(1) The applicant was properly informed

[28] I agree that the duty of procedural fairness includes the duty to properly inform an applicant of the case against him or her and to give the applicant an opportunity to respond and to know about the visa officer's concerns. It requires that an applicant be provided with a meaningful opportunity to present the various types of evidence relevant to his or her case and to have it fully considered (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 28). However, in the context of a visa application, this duty of fairness does not

require a visa officer to inform an applicant of concerns arising directly from the requirements of the legislation or regulations and to give the applicant an opportunity to disabuse himself or herself of those concerns (*Prasad v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 453, at para 7, 34 Imm LR (2d) (FCTD)).

[29] The jurisprudence in this Court has developed to specify that this duty of procedural fairness applies to concerns about credibility, veracity or authenticity of the documents rather than to the sufficiency of the evidence. There is no obligation on a visa officer to provide an applicant with an opportunity to address concerns of the officer when the supporting documents are incomplete, unclear or insufficient to satisfy the officer that the applicant meets all the requirements that stem from the Regulations (*Hamza v Canada (Minister of Citizenship and Immigration)*, 2013 FC 264 at paras 24-25 [*Hamza*]; *Gharialia* at paras 16-17; *Sharma* at para 8; *Veryamani v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1268 at paras 34-36 [*Veryamani*]).

[30] The onus thus remained on Ms. Pathirannahelage to demonstrate that she met the requirements of the Regulations by providing sufficient evidence in support of her application (*Hamza* at para 22; *Uddin* at para 38). Furthermore, as I have already noted, the duty of procedural fairness owed by a visa officer is at the low end of the spectrum (*Hamza* at para 23).

[31] In the current case, the Officer's concern was not about the veracity of Ms. Pathirannahelage's documents, but instead related to whether she had provided sufficient evidence to show she would be able to become economically established in Canada. Since this

issue concerns the sufficiency of the applicant's evidence rather than its credibility, the Officer was not actually obliged to provide notice to Ms. Pathirannahelage.

[32] In any event, the Officer provided notice to Ms. Pathirannahelage in this case and I find that, based on the evidence on the record, he did indeed properly inform Ms. Pathirannahelage, at the interview, of his concerns about her ability to become economically established in Canada. The Officer's concerns, as stated in his affidavit, were that she would not be able to find employment in Canada as a physiotherapist and that she did not appear to have any other plans to find employment "in an unrelated field". The Officer further said that Ms. Pathirannahelage was advised of these concerns at the March 2014 interview and that she was offered an opportunity to rebut these concerns. This was also recorded in the GCMS notes entered in the file.

[33] In her affidavit, Ms. Pathirannahelage says that the Officer did not advise her that he was considering a "substituted negative evaluation" for her case, but she does not challenge the Officer's statement that she was made aware of his concerns regarding her ability to become economically established. The Officer's affidavit and the GCMS notes clearly indicate that he had asked Ms. Pathirannahelage about her settlement plans, but found that she had not done any research about Canada, save for some information she received on Saskatoon offering opportunities in Canada. I further underline that the Officer had recorded his concerns about Ms. Pathirannahelage's ability to successfully establish in the GCMS notes on the same day that the interview was held.

[34] Therefore, while the Officer may or may not have specifically used the words "negative substituted evaluation" referred to by Ms. Pathirannahelage in her affidavit, I conclude that he did raise his concerns to her and asked her about her ability to economically establish in Canada. The fact that the Officer may not have used the words "substituted negative evaluation" in the interview cannot amount to a breach of procedural fairness in the current circumstances. Instead, I find that the Officer did fulfill his duty of procedural fairness and gave Ms. Pathirannahelage an opportunity to respond to his concerns during the interview.

[35] Ms. Pathirannahelage cites the *Sharma* decision, where this Court found that a visa officer's failure to inform an applicant that he would make a negative substituted evaluation, notwithstanding the fact that the applicant had obtained a sufficient amount of points, resulted in a breach of his duty of procedural fairness. However, that case is distinguishable as it was apparent from the decision that the visa officer in that case had not brought his concern about the applicant's ability to become economically established in Canada during the interview. Contrary to the situation in *Sharma*, there is in this case an affidavit of the Officer, as well as the GCMS notes, both referring to the fact that Ms. Pathirannahelage was informed of the Officer's concerns at the interview.

(2) ii. The procedural fairness letter was correctly sent

[36] In addition, the Officer went a step further and sent the procedural fairness letter to Ms. Pathirannahelage, which is an additional element showing that he fulfilled his duty of procedural fairness. I now turn to the arguments raised by Ms. Pathirannahelage about the procedural fairness letter.

[37] Ms. Pathirannahelage insists on the fact that this letter brings an important new element as it contained, for the first time, a specific reference to a possible "substituted negative evaluation" by the Officer. She also argues that sending such a letter was an essential procedural step to be followed by the Officer in the substituted evaluation process as the Minister's Operations Manual instructs visa officers to communicate such concerns in writing, in order to inform applicants of the possibility of a substituted evaluation and to offer them an opportunity to respond.

[38] As indicated above, there is contradictory evidence in this case with respect to the communication of this procedural fairness letter. Ms. Pathirannahelage and her consultant affirm that the letter was never received, while the Officer affirms that it was sent.

[39] It is well established that, when a communication is "correctly sent" by a visa officer to an address (by post or email) that has been provided by an applicant which has not been revoked or revised, and where there has been no indication received that the communication may have failed, the risk of non-delivery rests with the applicant and not with the visa office (*Zare v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1024 at para 36 [*Zare*]; *Yazdani* at para 45; *Kaur v Canada (Minister of Citizenship and Immigration)*, 2009 FC 935 at para 12). The visa office simply has to prove that it has correctly sent the notice. Once the Minister proves that the communication was sent, the applicant bears the risk involved in failure to receive the communication (*Patel v Canada*, 2014 FC 856 at para 16 [*Patel*]; *Yazdani* at para 45; *Ilahi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1399 at para 7 [*Ilahi*]). The visa office must simply demonstrate that the notice "went on its way" to the applicant, but has no

duty to prove that the applicant received the letter (*Caglayan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 485 at para 13 [*Caglayan*]). Furthermore, only where there is objective evidence that the correspondence was not received because of a proven communication failure is the visa office bearing the risk of the failure in communication (*Caglayan* at para 15).

[40] There are precedents from this Court illustrating how it can be proven that a visa officer has correctly sent the communication in matters involving regular mail, as is the case here. In *Yang v Canada (Minister of Citizenship and Immigration*), 2008 FC 935 at para 8 [*Yang*], Justice Snider was satisfied that the letter was sent by regular surface mail to the address indicated by the applicant, noting that a copy of the letter was contained in the file, the address was correct, and the electronic notes made explicit reference to the sending of the letter. In contrast, in *Ilahi* at para 8, Justice O'Reilly found that the respondent had not proven that the visa officer had sent the letter by regular mail. Although the electronic notes indicated that a letter had been sent, a copy of the letter was not produced, nor was there any direct evidence of the address to which it was sent. In *Caglayan*, the respondent filed a copy of the letter sent by mail, as well as an affidavit of a registry clerk attesting that she personally sent the letter using the label printed off the GCMS. Justice Martineau was unable to find any fault on the part of the respondent in that case and concluded that the notice had been sent (C*aglayan* at paras 8-9, 15 and 19).

[41] I pause to note that cases dealing with missed email communications are not directly relevant to the current case involving a missed letter sent by regular mail, as the delivery system is different and technical issues often arise with email communications (*Asoyan* at paras 21-22). The *Yazdani* case, in which the Court dealt with a situation where the visa office had requested

further documents from the applicant in an email claimed not to have been received, has been relied on in many subsequent cases involving email problems with the visa office. However, this decision was one of several cases involving different applicants experiencing the same technical email communication problem with one visa office (*Alavi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 969; *Zare*). In the current case, there is no evidence of any fault by the Colombo visa office, contrary to *Zare* or *Yazdani*.

[42] Not only is there no fault on the part of the visa office but there is also more than sufficient evidence on the record to convince the Court, on the balance of probabilities, that the procedural fairness letter was actually sent (*Patel* at para 21). This evidence includes the following elements. The GCMS notes of the Officer mentioned "PF letter drawing on R76(3)" on March 10, 2014. The Minister has provided a copy of the letter and an indication that it was sent to the right address on file for Ms. Pathirannahelage. The subsequent refusal letter was indeed received at that same address a few months later. The Officer used the standard procedure at the visa office and followed the usual practice to send the letter. The GCMS notes and the Officer's affidavit both confirm that the letter was sent to Ms. Pathirannahelage's consultant. Finally, a copy of the dated letter has been put on file, which would not have happened if the letter had not been sent using the usual practice of the visa office. Counsel for Ms. Pathirannahelage did not cross-examine the Officer on this evidence.

[43] Counsel for Ms. Pathirannahelage referred to the past history of communications between the applicant and the visa office and argued that the Officer should have been alert to the absence of response from Ms. Pathirannahelage following the issuance of the procedural fairness letter. I

cannot agree with that, as this would in fact put the burden back on the visa office, contrary to the case law cited above. Ms. Pathirannahelage also claims that, since it is not the person who actually sent the letter who signed the affidavit, but rather the Officer who authored it, I should give little weight to that evidence. I do not agree with this argument either, as the evidence shows that the Officer followed the standard procedure in this case.

[44] In addition, as stated in *Yang* at para 14, it would impose an impossible burden on the Canadian immigration authorities to require proof that correspondence are received in all cases given the volume of applications dealt with by the various visa offices. For all those reasons, I conclude that no breach of procedural fairness occurred in this case as the Officer ensured that Ms. Pathirannahelage was aware of the case against her and since the procedural fairness letter was correctly sent to her by the visa office.

C. *Reasonableness of the Officer`s negative substituted evaluation*

[45] I now consider the issue of the Officer's negative substituted evaluation. As indicated above, the reasonableness standard applies to such a decision by a visa officer. The Court must show a high degree of deference to an officer's findings on substituted evaluation issues in applications made under the FSW class (*Roohi* at paras 17 and 24-26; *Gharialia* at para 29). Based on the evidence on the record, I find that the Officer's Decision in this respect is reasonable and falls within the range of possible, acceptable outcomes defensible in light of the facts and applicable law.

[46] The Decision itself does not contain much detail as to why the Officer was not satisfied that Ms. Pathirannahelage would be able to become economically established in Canada. However, it is well established that a letter communicating the decision of a visa officer need not include all of the reasons for the decision, and that the GCMS notes are understood to form an integral part of the reasons and can be looked at to provide more information (*Rezaeiazar v Canada (Citizenship and Immigration),* 2013 FC 761 at para 58 [*Rezaeiazar*]; *Veryamani* at para 28).

[47] In her oral representations, counsel for Ms. Pathirannahelage insisted on the words "absent minimum educational requirements" used by the Officer both in the Decision and in his GCMS notes and argued that, in view of that language, the failure to meet the physiotherapy and licensing requirements was clearly the main reason underlying the Decision. By doing so, she submits, the Officer erred as he did not take the broader consideration approach prescribed by the *Roohi* and *Uddin* cases, and thus failed to go beyond the immediate field of work of Ms. Pathirannahelage in determining her ability to economically establish in Canada. I do not agree with this interpretation.

[48] I am rather satisfied that, when the Decision is considered as a whole and taking into account the GCMS notes, the Officer turned his mind to many other elements before deciding to opt for a substituted evaluation. The Officer was of course entitled to consider Ms. Pathirannahelage's capacity to work in her main area of interest and competence but his conclusion on her inability to become economically established in Canada was also based on other factors such as her absence of plans and research for potential work in general, and her

failure to indicate how she could draw upon the resources she had in Canada. In the GCMS notes, it was noted that Ms. Pathirannahelage had done little research into settlement and employment prospects in Canada.

[49] When the statements about the absence of minimum educational requirements are read in the context of the whole Decision, I have no hesitation to find that the Decision and the negative substituted evaluation were a reasonable outcome the Officer could arrive at based on the record. The Officer was simply not convinced that Ms. Pathirannahelage had demonstrated an ability to economically establish in Canada; such assessment is fact-specific and it is not for this Court to reweigh the evidence and intervene on the Officer's assessment.

[50] Ms. Pathirannahelage argues that she did not have to demonstrate that she had the required education to practice her profession in Canada. I agree. The Regulations do not contain a requirement that an applicant become economically self-sufficient in his or her qualifying occupation or join the labor market in the particular occupation they refer to in their application (*Uddin* at para 44; *Rezaeiazar* at para 82); and this is not what the Officer asked for in this case. But, as stated in *Gharialia* at para 37, since these are the skills that an applicant would likely rely on to make a living, it is reasonable for a visa officer to verify whether the applicant would be able to practice in the field they mention. So it was certainly logical and reasonable for the Officer to consider, as a relevant though not determinative consideration, Ms. Pathirannahelage's ability to work in her field of physiotherapy in Canada.

[51] Ms. Pathirannahelage argues that the *Gharialia* case is distinguishable on its facts, but I fail to see how. In *Gharialia*, the applicant had experience working in Ayurvedic medicine, but the visa officer was concerned because this type of medicine is not regulated in Canada and concluded that the applicant would not be able to work in that field in Canada. In the present case, physiotherapists require a certain university education and licensing in order to practice, a concern highlighted by the Officer as that could mean Ms. Pathirannahelage would not be able to work in that field. That said, this is not a situation where, as in *Rezaeiazar* at paras 81-82, a visa officer has unreasonably insisted that the applicant demonstrate economic self-sufficiency as a skilled worker in her particular field of skilled work. The evidence on the record and the Decision do not support the proposition that the Officer was requiring Ms. Pathirannahelage to demonstrate her ability to work as a physiotherapist as a condition to be convinced she would be able to successfully establish in Canada. It was just one of many factors considered by the Officer.

[52] In the end, I find that the Officer's reasons for his Decision are transparent and justifiable and that his decision on the negative substituted evaluation is one which falls within a range of possible, acceptable outcomes justified by the facts and the law (*Dunsmuir*, at para 53).

VIII. Conclusion

[53] For the foregoing reasons, this application for judicial review is dismissed. The Officer has met his duty of procedural fairness by discussing his concerns with Ms. Pathirannahelage during the interview and in sending the procedural fairness letter to Ms. Pathirannahelage. There was no breach of procedural fairness. With respect to the Officer's negative substituted

evaluation, I find that, in the circumstances of this case, the decision of the Officer was reasonable.

[54] Neither party has proposed a serious question of general importance for certification, and I agree there is none (*Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] FCJ No 1637, at para 4).

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, without costs.

2. No question is certified.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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