

**Date: 20080402**

**Docket: IMM-2843-07**

**Citation: 2008 FC 413**

**Toronto, Ontario, April 2, 2008**

**PRESENT: The Honourable Mr. Justice de Montigny**

**BETWEEN:**

**MICHAEL ESGUERRA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] This is an application for judicial review brought by Mr. Michael Esguerra from a decision of a visa officer dated April 3, 2007, according to which the applicant does not meet the requirements to obtain the permanent residence under the federal skilled worker category. Having duly and carefully considered the record and the submissions made by both parties, I have come to the conclusion that this application must be dismissed for the following reasons.

[2] The applicant is a 34-year old physiotherapist from the Philippines. He obtained a Certificate as a Dental Technician in 1993 and a Bachelor of Science in Physical Therapy in 1999. He has a total of 16 years of education. He has been working as a physiotherapist since 1999, first at the St. Lucia Physical Therapy and Rehabilitation Clinic as a staff physiotherapist, and since 2002 as a privately hired physiotherapist for two patients.

[3] In March 2002, he filed an application for permanent residence in Canada under the federal skilled worker category at the Canadian Embassy in Manila. On April 3, 2007, his application was refused mainly based on his low score obtained on the English language proficiency criteria.

### **THE IMPUGNED DECISION**

[4] The visa officer rejected the applicant's demand in the following terms:

Pursuant to the Immigration and Refugee Protection Regulations, 2002, skilled worker applicants are assessed on the basis of the criteria set out in subsection 76(1). The assessment of these requirements determines whether a skilled worker will be able to become economically established in Canada. The criteria are age, education, knowledge of Canada's official languages, experience, arranged employment and adaptability.

[5] The officer then proceeded to set out the points assessed for each of the selection criteria. He received the maximum points for age (10/10) and experience (21/21), and 20 points (out of a possibility of 25) for his education. He received no point for "arranged employment" and 5 points

(out of 10) for “adaptability”). Finally, he received 4 points for “official language proficiency”, for a total of 60 points.

You have obtained insufficient points to qualify for immigration to Canada, the minimum requirement being 67 points. Your English language proficiency points was based on your IELTS test score which is considered as conclusive evidence of your English proficiency. You have not obtained sufficient points to satisfy me that you will be able to become economically established in Canada.

[6] On that basis, the officer went on writing:

You have obtained insufficient points to qualify for immigration to Canada, the minimum requirement being 67 points. Your English language proficiency points was based on your IELTS test score which is considered as conclusive evidence of your English proficiency. You have not obtained sufficient points to satisfy me that you will be able to become economically established in Canada.

[7] The applicant does not contend that the officer erred in assessing the points for each of the selection criteria. However, he contends that his 7-point shortage misrepresents his ability to become economically established, and that the officer should have used the possibility of a substituted evaluation in light of his credentials, professional experience, financial establishment and Canadian family members.

## **ISSUES**

[8] There is only one issue to be considered in the context of this case, and it is whether the visa officer erred in failing to exercise his discretion pursuant to subsection 76(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the *IRPR*).

## RELEVANT PROVISIONS

[9] The pertinent subsection of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 is as follow:

**12.** (2) A foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada.

**12.** (2) La sélection des étrangers de la catégorie « immigration économique » se fait en fonction de leur capacité à réussir leur établissement économique au Canada.

[10] Sections 76 and 79 of the *IRPR* provide the following:

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

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

(i) education, in accordance with section 78,

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

(iii) experience, in accordance with section 80,

(iv) age, in accordance with section 81,

(v) arranged employment, in

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

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

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

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

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

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

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

accordance with section 82,  
and

l'article 82,

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

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

(b) the skilled worker must

b) le travailleur qualifié :

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

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

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

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

(3) Whether or not the skilled worker  
has been awarded the minimum  
number of required points referred to in  
subsection (2), an officer may  
substitute for the criteria set out in  
paragraph (1)(a) their evaluation of the  
likelihood of the ability of the skilled  
worker to become economically  
established in Canada if the number of  
points awarded is not a sufficient  
indicator of whether the skilled worker  
may become economically established  
in Canada.

(3) Si le nombre de points obtenu par  
un travailleur qualifié — que celui-ci  
obtienne ou non le nombre minimum  
de points visé au paragraphe (2) —  
ne reflète pas 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).

**79.** (1) A skilled worker must specify  
in their application for a permanent  
resident visa which of English or  
French is to be considered their first  
official language in Canada and which  
is to be considered their second official

**79.** (1) Le travailleur qualifié indique  
dans sa demande de visa de résident  
permanent la langue — français ou  
anglais — qui doit être considérée  
comme sa première langue officielle  
au Canada et celle qui doit être  
considérée comme sa deuxième

language in Canada and must

(a) have their proficiency in those languages assessed by an organization or institution designated under subsection (3); or

(b) provide other evidence in writing of their proficiency in those languages.

(2) Assessment points for proficiency in the official languages of Canada shall be awarded up to a maximum of 24 points based on the benchmarks referred to in *Canadian Language Benchmarks 2000* for the English language and *Standards linguistiques Canadiens 2002* for the French language, as follows:

(a) for the ability to speak, listen, read or write with high proficiency

(i) in the first official language, 4 points for each of those abilities if the skilled worker's proficiency corresponds to a benchmark of 8 or higher, and

(ii) in the second official language, 2 points for each of those abilities if the skilled worker's proficiency corresponds to a benchmark of 8 or higher;

(b) for the ability to speak, listen, read or write with moderate proficiency

langue officielle au Canada et :

a) soit fait évaluer ses compétences dans ces langues par une institution ou organisation désignée aux termes du paragraphe (3);

b) soit fournit une autre preuve écrite de sa compétence dans ces langues.

(2) Un maximum de 24 points d'appréciation sont attribués pour la compétence du travailleur qualifié dans les langues officielles du Canada d'après les standards prévus dans les *Standards linguistiques canadiens 2002*, pour le français, et dans le *Canadian Language Benchmarks 2000*, pour l'anglais, et selon la grille suivante :

a) pour l'aptitude à parler, à écouter, à lire ou à écrire à un niveau de compétence élevé :

(i) dans la première langue officielle, 4 points pour chaque aptitude si les compétences du travailleur qualifié correspondent au moins à un niveau 8,

(ii) dans la seconde langue officielle, 2 points pour chaque aptitude si les compétences du travailleur qualifié correspondent au moins à un niveau 8;

b) pour les capacités à parler, à écouter, à lire ou à écrire à un

(i) in the first official language, 2 points for each of those abilities if the skilled worker's proficiency corresponds to a benchmark of 6 or 7, and

(ii) in the second official language, 2 points for each of those abilities if the skilled worker's proficiency corresponds to a benchmark of 6 or 7; and

(c) for the ability to speak, listen, read or write

(i) with basic proficiency in either official language, 1 point for each of those abilities, up to a maximum of 2 points, if the skilled worker's proficiency corresponds to a benchmark of 4 or 5, and

(ii) with no proficiency in either official language, 0 points if the skilled worker's proficiency corresponds to a benchmark of 3 or lower.

(3) The Minister may designate organizations or institutions to assess language proficiency for the purposes of this section and shall, for the purpose of correlating the results of such an assessment by a particular designated organization or institution with the benchmarks referred to in subsection (2), establish the minimum test result required to be awarded for each ability and each level of proficiency in the course of an

niveau de compétence moyen :

(i) dans la première langue officielle, 2 points pour chaque aptitude si les compétences du travailleur qualifié correspondent aux niveaux 6 ou 7,

(ii) dans la seconde langue officielle, 2 points si les compétences du travailleur qualifié correspondent aux niveaux 6 ou 7;

c) pour l'aptitude à parler, à écouter, à lire ou à écrire chacune des langues officielles :

(i) à un niveau de compétence de base faible, 1 point par aptitude, à concurrence de 2 points, si les compétences du travailleur qualifié correspondent aux niveaux 4 ou 5,

(ii) à un niveau de compétence de base nul, 0 point si les compétences du travailleur qualifié correspondent à un niveau 3 ou à un niveau inférieur.

(3) Le ministre peut désigner les institutions ou organisations chargées d'évaluer la compétence linguistique pour l'application du présent article et, en vue d'établir des équivalences entre les résultats de l'évaluation fournis par une institution ou organisation désignée et les standards mentionnés au paragraphe (2), il fixe

assessment of language proficiency by that organization or institution in order to meet those benchmarks.

(4) The results of an assessment of the language proficiency of a skilled worker by a designated organization or institution and the correlation of those results with the benchmarks in accordance with subsection (3) are conclusive evidence of the skilled worker's proficiency in the official languages of Canada for the purposes of subsections (1) and 76(1).

le résultat de test minimal qui doit être attribué pour chaque aptitude et chaque niveau de compétence lors de l'évaluation de la compétence linguistique par cette institution ou organisation pour satisfaire à ces standards.

(4) Les résultats de l'examen de langue administré par une institution ou organisation désignée et les équivalences établies en vertu du paragraphe (3) constituent une preuve concluante de la compétence du travailleur qualifié dans les langues officielles du Canada pour l'application des paragraphes (1) et 76(1).

## ANALYSIS

[11] Before turning to the substantive issue raised in this application, a word must be said about the appropriate standard of review. Both parties argued that the visa officer's decision must be assessed against the standard of reasonableness, and I agree. This comes as a result of the recent decision of the Supreme Court of Canada in *Dunsmuir v. New-Brunswick*, 2008 SCC 9, where the two reasonableness standards (patent unreasonableness and reasonableness *simpliciter*) were merged. As the Court stated, at paragraph 53, “[w]here the question is one of fact, discretion or policy, deference will usually apply automatically”.

[12] As a result, this Court will intervene only when the decision does not fall “within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (at para. 47). This is in recognition of the fact that administrative tribunals must be accorded a fair margin of



appreciation, and that there may be more than one rational solution when factual issues are at stake. The focus, therefore, will be on the “existence of justification, transparency and intelligibility within the decision-making process” (at para. 47).

[13] Turning now to the substantive issue, the applicant relied on paragraph 76(3) of the *IRPR* to argue that the officer should have substituted his evaluation for the selection system, on the basis that the point total he was given is not a sufficient indicator of whether or not the applicant may become economically established in Canada. Although not requested to do so by the applicant, the CAIPS notes reveal that the visa officer did consider the possibility of substituting his evaluation, but was satisfied that the points assessment reflected the applicant’s capacity to become established in Canada. On the basis of the record that was before him, this was most certainly an “acceptable” outcome.

[14] First of all, I believe the points allocated to the applicant for his English proficiency were correctly assigned by the visa officer. IELTS is a testing organization recognized by the Guidelines and section 79(4) of the *IRPR* provides that the test results by a recognized organization are conclusive evidence of an applicant’s proficiency in English. The OP6 Guidelines (*Federal Skilled Workers*) also provide a specific equivalency chart to convert IELTS results into points (section 10.7), and state that a visa officer can not override the test results and substitute his own evaluation of language abilities.

[15] With respect to the applicant's contention that the visa officer should have used her discretion and substituted her own evaluation for the criteria set out in paragraph 76(1)(a) of the *IRPR*, I would make the following comments. The jurisprudence under previous similar legislation held that the visa officer's residual discretion should be decisive only in cases that present unusual facts, or where the applicant has come close to obtaining the required units of assessment: *Chen v. Canada (Minister of Citizenship and Immigration)* (1999), 166 F.T.R. 78 at para. 23 (F.C.); *Kim v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 857. I see no reason to depart from that case law in the present instance.

[16] The discretion under subsection 76(3) of the *IRPR* is clearly exceptional and applies only in cases where the points awarded are not a sufficient indicator of whether the skilled worker will become economically established. The fact that the applicant or even this court would have weighed the factors differently is not a sufficient ground for judicial review.

[17] The applicant obtained only 60 points, and was therefore 7 points short of the required 67 points. It cannot be said that he came close to the minimum units established by the *IRPR*. Moreover, there is no evidence on the record that the language test is not a fair reflection of his ability in English. The applicant was given an opportunity to update his file, but didn't provide any evidence that his scores could be displaced. It is true that he successfully completed a five-year physiotherapy program in English; but that was in 1999, some seven years before he took the IELTS test.

[18] It was not unreasonable for the visa officer to conclude that the points reflected the applicant's ability to establish himself economically in Canada. Not only is there no evidence that the language test is not a reliable indicator of his proficiency in English, but there is nothing in the record tending to demonstrate that other factors were not sufficiently taken into account. As already mentioned, his credentials, financial establishment and professional experience have all been taken into account, and I may add that he appears to have been quite favorably evaluated especially with respect to his professional experience. As to the fact that he has family in Canada, I do not think that it is sufficient to displace the score he received on the point system.

[19] In summary, I believe the visa officer could reasonably come to the conclusion that this was not an exceptional situation that warranted a substituted evaluation. There was simply not enough evidence tending to demonstrate that the points obtained were not a fair reflection of the applicant's ability to become economically established. As a result, this application for judicial review shall be dismissed.

**ORDER**

**THIS COURT ORDERS that** the application for judicial review is dismissed.

"Yves de Montigny"

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Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

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**APPEARANCES:**

Josh Lang For the Applicant

Alexis Singer For the Respondent

**SOLICITORS OF RECORD:**

Josh Lang  
Toronto, Ontario For the Applicant

John S. Sims, Q.C.  
Deputy Attorney General of Canada For the Respondent