

Federal Court



Cour fédérale

Date: 20091029

Docket: IMM-223-09

Citation: 2009 FC 1107

Ottawa, Ontario, October 29, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

LU WANG

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision by a Visa Officer (Officer) dated September 25, 2008 (Decision) refusing the Applicant's application for a permanent resident visa as a member of the Federal Skilled Worker Class.

BACKGROUND

[2] The Applicant made an application for permanent resident status in Canada under the Federal Skilled Worker Class on January 15, 2006, which included her spouse and son as family members. The application was refused by the Officer on September 25, 2008, pursuant to subsection 11(1) of the Act. The Officer found that the Applicant did not meet the requirements for immigration to Canada, since she had not obtained enough points to demonstrate that she would become economically established once in Canada under subsections 75(2) and 76(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations). The Applicant seeks to have this Decision quashed and sent back for reconsideration.

DECISION UNDER REVIEW

[3] The Officer's assessment of the Applicant was based on the minimum requirements set out in subsection 75(2) and the criteria set out in subsection 76(1) of the Regulations. The criteria to be assessed include age, education, experience, arranged employment and adaptability, as well as knowledge of Canada's official languages.

[4] Based on the Officer's assessment, the Applicant scored 61 of the 67 points necessary for immigration to Canada. As a result, the Applicant was not granted permanent resident status. In his assessment, the Officer granted the Applicant zero points for adaptability, which included consideration of the Applicant's spouse's education as well as the existence of any relatives living in Canada.

ISSUES

[5] The following issues arise from the Applicant's arguments:

1. Did the Officer err in interpreting and applying the statutory definition of "educational credential" under section 73 and "post-secondary" under subsection 78(2) of the Regulations?
2. Did the Officer err by concluding that the Applicant did not have relatives in Canada as per subsection 83(5) of the Regulations?
3. Did the Officer breach the duty of procedural fairness owed to the Applicant by:
 - a. Failing to properly address the documentary evidence provided in her application?
 - b. Failing to discuss his dissatisfaction with the documentation before rendering a decision?

STATUTORY PROVISIONS

[6] The following sections of the Regulations are applicable in this proceeding:

73. The following definitions apply in this Division, other than section 87.1.

"educational credential"

73. Les définitions qui suivent s'appliquent à la présente section, à l'exception de l'article 87.1.

« diplôme »

“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 les établissements d’enseignement dans le pays de délivrance de ce diplôme ou certificat.

...

...

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 :

...

...

(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

(ii) il a obtenu un

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;

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;

...

...

83 (1) A maximum of 10 points for adaptability shall be awarded to a skilled worker on the basis of any combination of the following elements:

83 (1) Un maximum de 10 points d'appréciation sont attribués au travailleur qualifié au titre de la capacité d'adaptation pour toute combinaison des éléments ci-après, selon le nombre indiqué :

(a) for the educational credentials of the skilled worker's accompanying spouse or accompanying common-law partner, 3, 4 or 5 points determined in accordance with subsection (2);

a) pour les diplômes de l'époux ou du conjoint de fait, 3, 4 ou 5 points conformément au paragraphe (2);

...

...

(d) for being related to a person living in Canada who is described in subsection (5), 5 points; and

d) pour la présence au Canada de l'une ou l'autre des personnes visées au paragraphe (5), 5 points;

...

...

83 (2) For the purposes of paragraph (1)(a), an officer shall evaluate the educational credentials of a skilled worker's accompanying spouse or accompanying common-law partner as if the spouse or

83 (2) Pour l'application de l'alinéa (1)a), l'agent évalue les diplômes de l'époux ou du conjoint de fait qui accompagne le travailleur qualifié comme s'il s'agissait du travailleur qualifié et lui

common-law partner were a skilled worker, and shall award points to the skilled worker as follows:

(a) for a spouse or common-law partner who would be awarded 25 points, 5 points;

(b) for a spouse or common-law partner who would be awarded 20 or 22 points, 4 points; and

(c) for a spouse or common-law partner who would be awarded 12 or 15 points, 3 points.

...

83 (5) For the purposes of paragraph (1)(d), a skilled worker shall be awarded 5 points if

(a) the skilled worker or the skilled worker's accompanying spouse or accompanying common-law partner is related by blood, marriage, common-law partnership or adoption to a person who is a Canadian citizen or permanent resident living in Canada and who is

(i) their father or mother,

(ii) the father or mother of their father or mother,

attribue des points selon la grille suivante :

a) dans le cas où l'époux ou le conjoint de fait obtiendrait 25 points, 5 points;

b) dans le cas où l'époux ou le conjoint de fait obtiendrait 20 ou 22 points, 4 points;

c) dans le cas où l'époux ou le conjoint de fait obtiendrait 12 ou 15 points, 3 points.

...

83 (5) Pour l'application de l'alinéa (1)d), le travailleur qualifié obtient 5 points dans les cas suivants :

a) l'une des personnes ci-après qui est un citoyen canadien ou un résident permanent et qui vit au Canada lui est unie par les liens du sang ou de l'adoption ou par mariage ou union de fait ou, dans le cas où il l'accompagne, est ainsi unie à son époux ou conjoint de fait :

(i) l'un de leurs parents,

(ii) l'un des parents de leurs parents,

(iii) their child,	(iii) leur enfant,
(iv) a child of their child,	(iv) un enfant de leur enfant,
(v) a child of their father or mother,	(v) un enfant de l'un de leurs parents,
(vi) a child of the father or mother of their father or mother, other than their father or mother, or	(vi) un enfant de l'un des parents de l'un de leurs parents, autre que l'un de leurs parents,
(vii) a child of the child of their father or mother; or	(vii) un enfant de l'enfant de l'un de leurs parents;
(b) the skilled worker has a spouse or common-law partner who is not accompanying the skilled worker and is a Canadian citizen or permanent resident living in Canada.	b) son époux ou conjoint de fait ne l'accompagne pas et est citoyen canadien ou un résident permanent qui vit au Canada.

[7] The following excerpt of the Federal Courts *Immigration and Refugee Protection Rules*

S.O.R./93-22, s. 22 is also applicable in this case:

22. No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.

22. Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, la demande d'autorisation, la demande de contrôle judiciaire ou l'appel introduit en application des présentes règles ne donnent pas lieu à des dépens.

STANDARD OF REVIEW

[8] The Applicant has raised various issues for judicial review. The first issue involves both statutory interpretation and the application of the law to the facts of this case. The Court will examine the Officer's statutory interpretation on a correctness standard, while the Officer's application of the law to the facts of this case will be considered on a reasonableness standard: *Kim v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 812. The reasonableness standard also applies to the second issue related to the Officer's application of the law to the facts of the case in determining that the Applicant had no family in Canada pursuant to the subsection 83(5) of the Regulations.

[9] The third issue raises matters of procedural fairness, which is reviewable on a standard of correctness: *Lak v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 350 at paragraphs 5 and 6 (Lak); *Salman v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 877 at paragraphs 7-9 (Salman). As such, if any breach of procedural fairness is found, the Decision will be quashed

[10] In *Dunsmuir v. New Brunswick* 2008 SCC 9 (*Dunsmuir*) the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards

undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review”: *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of “reasonableness” review.

[11] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[12] Thus, in light of the Supreme Court of Canada’s decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the second issue is reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

ARGUMENTS

The Applicant

Did the Visa Officer err in his interpretation and application of the Regulations?

Post-Secondary Education Credentials

[13] The Applicant submits that her spouse has completed a 2.5 year full-time post-secondary program at the Anshan Finance and Economics School, which is a state-recognized vocational training school. In total, the Applicant's spouse has had 14.5 years of full-time education.

[14] According to the CAIPS notes, the Officer did not accept the Applicant's spouse's educational credentials because his highest level of education is a vocational school which is not recognized by the China Academic Degree & Graduate Education Development Center (GADGEDC) as post-secondary education. As such, the Applicant received no points for adaptability based on her spouse's training.

[15] The Applicant submits that there is no requirement in the Regulations for CADGEDC to recognize the spouse's education in order to make it valid. Rather, the definition of "education credential" in the Regulations includes diplomas issued by training institutions recognized by the authorities responsible for registering, accrediting, supervising and regulating training institutions in China. The Applicant submits that CADGEDC is not such an authority. Moreover, the Applicant

notes that simply because CADGEDC does not have the authority to recognize the institution attended by the Applicant's spouse does not mean that the institution is not a training institution as per the Regulations.

[16] Along with her application, the Applicant filed a notarized copy of her spouse's diploma and an original transcript. When the Applicant requested that CADGEDC provide an educational credential report, CADGEDC was unable to do so, telling her that they were unable to verify college diplomas or occupational training diplomas. As such, the Applicant was unable to provide to CIC the educational credential report it had requested.

[17] The Applicant submits that, in China, notary public offices are the most authoritative body for certifying documents, which includes education credentials. In fact, the Applicant submits that even after the creation of CADGEDC in 2003, notary public offices still do the majority of certification of degrees and diplomas.

[18] What is more, the Applicant submits that there are instances in other immigration application cases where educational credentials issued by vocational or training institutions have been accepted. As an example, the Applicant submits the names of two people whose spouse's education credentials have been recognized based on notarized copies of their diplomas. Due in part to these notarized diplomas, these two families were issued permanent resident visas in Hong Kong in 2007.

Family in Canada

[19] The Applicant's brother, his wife, and their daughter moved to Canada in 2004. However, the Applicant's brother travelled back and forth to China for work-related purposes for their first two years of residence. The Applicant submits that evidence was placed before the Officer that the Applicant has a brother and a niece, both of whom are considered related persons pursuant to section 83(5) of the Regulations and who were living in Canada when she applied for status as a permanent resident and when the Decision was made.

[20] The Applicant submits that the term "living in Canada" can include someone who is a permanent resident but is outside of the country on business and whose spouse and child are still in the country. Accordingly, the Applicant believes that the Officer erred in holding that only the Applicant's sister-in-law was residing in Canada and in awarding no points for this factor. The Applicant contends that, because of these relatives, she should have been granted five points under the Adaptability section for having relatives in Canada.

Breaches of Procedural Fairness

Improper Treatment of Evidence

[21] The Applicant contends that the Officer breached the duty of procedural fairness by failing to properly assess the documentary evidence included in her application. For instance, the Officer failed to acknowledge or address the notary document from Beijing No. 2 Notary Public Office in

which the notary found that both the photocopy and the original certificates from the Applicant's spouse's educational institute were authentic. There is no evidence in this case that the Officer considered the documentation from the notary public. The Applicant submits that such evidence is required, and that the Officer's failure to provide adequate reasons for his dismissal of the evidence constitutes a breach of procedural fairness.

[22] The Applicant cites and relies on the case of *Lak* to show that a breach of procedural fairness may result from a failure to provide adequate reasons for a decision, and that such failure may stem from a failure to discuss evidence provided by an applicant. In the present case, there is no evidence that the Officer considered the documentation from the notary public. This resulted in a breach of procedural fairness.

[23] The Applicant believed that the Notary Public's Office certification of the degree was adequate to certify the educational credential because this practice had been accepted by visa officers in other cases, and because the Officer did not inform the Applicant that the notarization was not sufficient. Moreover, the Applicant's representative provided a letter to the Officer explaining that CADGEDC could not provide certification for the diploma, and that the notary public had verified its authenticity. Neither the Applicant nor the Applicant's representative received any response to this letter. In fact, no correspondence came from the Officer until the refusal letter arrived approximately 2.5 years later.

[24] The Applicant relies upon the case of *Salman* to show that a duty exists for a visa officer to express his or her concerns to an applicant regarding the credibility and genuineness of documents and to provide the applicant with an opportunity to respond to these concerns (cited from *Hassani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283).

[25] Similarly, the Applicant submits that there was a duty on the Officer to raise his concerns regarding the documents submitted in this case to the Applicant, and to provide her with an opportunity to respond. This did not occur, and the Applicant contends that this oversight constituted a breach of procedural fairness. What is more, in the case of *Salman*, it was held that the officer committed an error in failing to consider the applicant's explanation for not having the standard proof of education, and that the officer had a duty to investigate this more thoroughly.

[26] The Applicant also cites and relies on the case of *Kojouri v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1389, to show that an officer has a duty to make further inquiries about documents that raise concerns. In *Kojouri*, the officer breached the duty by failing to discuss his concerns with the applicant before finding the documents were not credible. Indeed, rejecting the evidence at that stage of the case was found to be a breach of procedural fairness.

[27] While the Applicant acknowledges that it was her duty to provide information for the Officer to assess, she submits that there are instances when procedural fairness demands that a visa officer undertake some additional investigation. Such a duty existed in the case of *Salman*, and the Applicant submits that a similar duty was owed to her in this instance.

[28] In light of the arguments given, the Applicant seeks to have the order quashed and the matter remitted for reconsideration. She is also seeking costs for this application.

The Respondent

[29] The Respondent submits that pursuant to subsection 11(1) of the Act, the Applicant bears the onus of satisfying the Officer that the issuance of a visa would not contravene the requirements of the Act. In this case, the Applicant did not convince the Officer that she had satisfied all of the requirements of the Act.

Education

[30] The Applicant can only receive credit for her spouse's education where the education is found to be valid. What is more, the onus lies with the Applicant to prove the veracity of the alleged education. In this case, the education credentials could not be verified by CADGEDC, which is the recognized institution used by CIC pursuant to section 73 of the Regulations to certify the validity of Chinese education credentials.

[31] The Officer found that the Applicant's spouse's education did not meet the requirement that the education be post-secondary, as set out in subsection 78(2)(d) of the Regulations. As explained in the Officer's affidavit, the Embassy received a letter from CADGEDC explaining that it could

not provide verification because they were “not authorized to verify documents of non-higher education.” As such, the Applicant’s spouse’s education was not at a sufficient level to qualify for points. The Officer followed the applicable legislation in arriving at his Decision, and while the Applicant may disagree with the weight given by the Officer to CADGEDC’s assessment, this does not amount to an error of law.

Family in Canada

[32] The Respondent submits that the onus was on the Applicant to provide all relevant information and evidence to support her application for permanent residence. While the Applicant disputes not having been assigned points for her brother’s residing in Canada, the Respondent submits that this was due to insufficient evidence having been produced to verify this claim. When the Applicant was asked to provide proof that her brother was living in the country, she replied with a letter that explained that it was her sister-in-law who was living in Canada. She provided evidence of her sister-in-law’s residence. The Officer did not have sufficient evidence to establish that she had qualifying family in Canada. Consequently, he was unable to award her any qualifying points.

ANALYSIS

Education of Spouse

[33] As the CAIPS notes show, when the Officer reviewed the spouse’s education under the Adaptability factor, he concluded that his “highest level of education is vocational school (not recognized by CADGEDC as post-secondary education). 0 points.”

[34] Whether or not the spouse’s post-secondary education is recognized by CADGEDC is irrelevant. In my view, the Officer simply treats CADGEDC recognition as a requirement under the Act and the Regulations. This is an error of law.

[35] Subsection 78(2)(d)(i) of the Regulations establishes what is required for a 2.5 year program to receive 20 points for a non-university credential:

...	...
(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,
...	...

[36] CADGEDC informed the Officer that it was “not authorized to verify documents of non-higher education.” Although there is some confusion as to what CADGEDC meant by “non-higher education,” in the context of this case it is clear to me that CADGEDC was merely explaining that it could not verify vocational education at that time.

[37] This did not mean that the spouse's vocational education did not count for purposes of assessing adaptability, or that it was not verified by other means. The Officer simply decided to discount the vocational education because CADGEDC was not in a position to verify it.

[38] In doing so, the Officer committed an error of law by treating a CADGEDC verification as a requirement under the Act, and a procedural error in totally disregarding the evidence of authenticity provided by the Applicant and/or by not raising his concerns with the Applicant so that the matter could be addressed. See *Lak* at paragraphs 13 and 15; *Salman* at paragraphs 11-16; *Kojouri* at paragraphs 17-18.

[39] Had the Officer properly addressed this issue the Applicant, on the evidence before me, would have received an additional 4 points.

Related Person Living in Canada

[40] As the CAIPS notes show, on this issue the Officer concluded that "PA's brother is PR. However, only his spouse (PA's sister-in-law) is residing in Cda. 0 points."

[41] In his affidavit prepared for this application the Officer provides the following explanation for his decision to award 0 points for this factor:

17. On her application, the Applicant stated she had a brother living in Canada who had Permanent Resident status.

However, no evidence to support this statement was provided. We requested that the applicant submit proof that her brother was living in Canada and that he is a Permanent Resident. On April 28, 2006, the applicant drafted a letter acknowledging our request but stating that it was her sister in law who was living in Canada. She included documentary evidence showing that her sister in law had been residing in Canada, but did not provide any evidence that her brother was living in Canada. A true copy of this letter dated April 28, 2006 is attached to this affidavit as "Exhibit B."

18. From this we found it reasonable to conclude that the applicant does not have a sibling living in Canada, and so no adaptability points were awarded.

[42] In her letter of April 28, 2006, which was a response to the Officer's request for verification that she had a brother living in Canada, the Applicant provided evidence that her brother's wife (her sister-in-law) was living and working in Toronto.

[43] The Officer appears to have decided that this was insufficient evidence to establish that the Applicant had qualifying family in Canada as per subsection 83(5) of the Regulations.

[44] The documentation submitted by the Applicant which established that her brother (Wang Chunming) had permanent residence status was as follows:

The following documents were sent to CIC in January 19, 2006:

- a. Confirmation of Permanent Resident status (Landing-paper) for Wang Chunming;
- b. Permanent Resident Card of Tong Qian, Wang Chunming's wife;

- c. Study certificate of Tong Qian issued by the university where she was studying;
- d. Marriage certificate of Wang Chunming and Tong Qian (showing the relationship between the applicant and the relative in Canada).

The following documents were sent to CIC in December 17, 2008:

- a. Permanent Resident Card of Wang Chunming;
- b. Confirmation of Permanent Resident status (Landing-paper for Wang Chunming);
- c. Driver License (of Canada) of Wang Chunming;
- d. Installment payment for house;
- e. Studying certificate for Wang Chunming written by his professor;
- f. A letter from Commissioner of Revenue for Wang Chunming;
- g. Citizen Card of Wang Yiqun, niece of the applicant;
- h. Studying certificate of Wang Yiqun;
- i. Citizen Card of Tong Qian, sister-in-law of the applicant.
- j. Water and electricity bills in the name of Tong Qian.

[45] In my view, the contents of the Applicant's letter of April 28, 2006, were simply an attempt to explain that the brother's wife's presence in Canada was evidence of the family's permanent residence here. This is because the brother was away on a business trip to China.

[46] If there was any ambiguity about this, the Applicant had been reassured by the Canadian Consulate in a letter of May 9, 2006 that “should we require additional information or documents in order to make an assessment we will contact you as required.” The Officer did not bother to request additional information about the brother’s whereabouts and why the Applicant provided evidence about the brother’s wife. The Officer simply decided that the Applicant had not shown that the brother was living in Canada. But the proof of his permanent residence and the consulate’s undertaking to let the Applicant know if additional information was required remove this case from the usual situation. The Officer’s decision not to seek additional information to clarify the ambiguity in the Applicant’s letter of April 28, 2006, was a breach of procedural fairness.

[47] There is no evidence to support a conclusion that the Applicant’s brother was not residing in Canada. A temporary business trip to China does not mean that the brother was not residing in Canada (see *Kim v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 812.) The Officer simply did not bother to assess the evidence as a whole and/or clarify with the Applicant any confusion that may have arisen over the brother’s status in Canada in accordance with the Consulate’s letter of May 9, 2006.

[48] Had the Officer assessed this factor correctly, then the Applicant could have received an additional 5 points. This would have given her an additional 9 points in total, which would have taken her beyond the 67 points required to qualify.

[49] The Applicant has requested costs for this application. Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules* states that no costs shall be awarded unless special reasons exist to justify such an order. The Applicant has not given any special reason to justify such an order. Although I have found adequate reason to quash the order and send it back for reconsideration, I do not believe that there are special reasons in this instance to justify awarding costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is allowed, the Decision is quashed, and the matter is returned for reconsideration by a different officer in accordance with these reasons.
2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.: IMM-223-09

STYLE OF CAUSE: LU WANG
v.
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: St. John's, NL

DATE OF HEARING: September 9, 2009

REASONS FOR JUDGMENT: RUSSELL J.

DATED: October 29, 2009

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