

Federal Court



Cour fédérale

**Date: 20100226**

**Docket: IMM-2190-09**

**Citation: 2010 FC 225**

**Ottawa, Ontario, February 26, 2010**

**PRESENT: The Honourable Mr. Justice Near**

**BETWEEN:**

**RAJITH NIROSHAN WICKRAMASEKERA  
DILKA ROSHANI DE LIVERA KARUNARATNE  
HERANTHA SHAMAL WICKRAMASEKERA  
ANISHKA MANEETH WICKRAMASEKERA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of the decision (the decision), dated March 2, 2009, of an Immigration Officer to refuse the Applicant's application for Immigrant Visas to Canada under the Federal Skilled Worker category of migrants.

[2] For the reasons set out below, this application is dismissed.

I. Background

[3] The principal Applicant is a 38 year-old citizen of Sri Lanka. He is married to Dilka Roshani De Livera Karunaratne, the co-Applicant in this judicial review. In April 2007, the Applicant and his family applied for Immigrant Visas to Canada under the Federal Skilled Worker (FSW) category. This category works on a point system and points are allotted based on criteria such as age, education, language skills, and work experience. Normally an applicant must score 67 points to be eligible for a Visa. The Applicant scored 60 points.

[4] The Applicant applied for a “substituted evaluation” of his application under subsection 76(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. The Applicant cited his good educational qualifications, international exposure and good financial circumstances as the basis for the substituted evaluation. The Immigration Officer denied the Applicant’s request for substituted evaluation and denied the Applicant’s application as a whole.

[5] In a letter to the Applicant, the Immigration Officer stated the following with regard to denying the Applicant’s request for substituted evaluation:

I’ve also noted your request for positive substituted evaluation in this case. After a careful review of the file, I’m satisfied that the points awarded are an accurate reflection of your ability to settle in Canada and as such that substituted evaluation in this case is not warranted.

[6] The Immigration Officer's notes, which can also be considered part of the reasons (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; [1999] S.C.J. No. 39), state:

As fully reviewed the file, I'm satisfied that the pnts awarded in this case are an accurate reflection of the PI's ability to settle in Canada. I am satisfied that SOE is not warranted in this case.

## II. Legislative Framework

[7] The FSW category is governed by sections 75-85 of the *Immigration and Refugee Protection Regulations*. The primary method for determining whether an applicant qualifies to be a member of this category is set out in subsection 76(1)(a) of the *Regulations*. Subsection 76(3) provides the Immigration Officer with the discretion to substitute criteria in the evaluation if the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada. The relevant provision is set out thus:

### Selection criteria

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

### Critères de sélection

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

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 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 half the minimum necessary income applicable in respect of the group of persons consisting of the skilled worker and their family members, or

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 l'article 82,

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

b) le travailleur qualifié :

(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).

Number of points

Nombre de points

(2) The Minister shall fix and make available to the public the minimum number of points required of a skilled worker, on the basis of

(2) Le ministre établit le nombre minimum de points que doit obtenir le travailleur qualifié en se fondant sur les éléments ci-après et en informe le public :

(a) the number of applications by skilled workers as members of the federal skilled worker class currently being processed;

a) le nombre de demandes, au titre de la catégorie des travailleurs qualifiés (fédéral), déjà en cours de traitement;

(b) the number of skilled workers projected to become permanent residents according to the report to Parliament referred to in section 94 of the Act; and

b) le nombre de travailleurs qualifiés qui devraient devenir résidents permanents selon le rapport présenté au Parlement conformément à l'article 94 de la Loi;

(c) the potential, taking into account economic and other relevant factors, for the establishment of skilled workers in Canada.

c) les perspectives d'établissement des travailleurs qualifiés au Canada, compte tenu des facteurs économiques et autres facteurs pertinents.

Circumstances for officer's substituted evaluation

Substitution de l'appréciation de l'agent à la grille

(3) Whether or not the skilled worker has been awarded the

(3) Si le nombre de points obtenu par un travailleur

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.

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).

[8] It should be noted that the discretion under subsection 76(3) 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 in Canada (see *Esguerra v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 413; [2008] F.C.J. No. 549).

### III. Standard of Review

[9] The standard of review of a discretionary decision of a visa officer for substituted evaluation is reasonableness (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12; [2009] 1 S.C.R. 339, *Poblano v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1167; [2005] F.C.J. No. 1424). Issues related to the duty of fairness are evaluated on a correctness standard.

IV. Issue

[10] The Applicant raises the following issue: did the Immigration Officer err by failing to provide reasons for the decision to deny the Applicant's request for substituted evaluation?

[11] The Applicant argues that the Immigration Officer breached the duty of fairness owed to the Applicant as she or he failed to provide the Applicant with coherent and understandable reasons as to why his request for substituted evaluation was denied.

[12] The Respondent argues that the Officer's reasons with respect to the substituted evaluation were adequate.

[13] The provision of reasons performs two main functions. First, they help ensure that the decision-maker has focused on the factors that must be considered in the decision making process. Second, they enable parties to exercise their right to judicial review and for the court to conduct a meaningful review of the decision (see *Ragupathy v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 151; [2007] 1 F.C.R. 490).

[14] The fact that the reasons may be short is not an error in itself. In *Almasy v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 701; [2001] F.C.J. No. 1041, Justice Frederick Gibson considered the provision of very short reasons in a refugee claim. Justice Gibson held that this is not, in itself, a fault. He stated that brief reasons are to be encouraged where those reasons reflect a

clear grasp of the evidence and an adequate analysis of the evidence against the relevant statutory, regulatory and jurisprudential law (see paragraph 9).

[15] In *Poblano*, above, Justice Konrad von Finckenstein considered the issue of an Immigration Officer refusing to exercise their discretion for a substituted evaluation of the applicant's claim. In *Poblano*, above, the applicant submitted that the Officer did not provide any reasons for her decision in the refusal letter. Justice von Finckenstein held that there was no reason for the Court to set the decision aside. At paragraphs 6 and 7 he stated:

6 The affidavit of the officer (on which she was not cross examined) and the CAIPS notes clearly indicate that the officer considered the letter.

7 As for written reasons, while they are always desirable, there is no requirement for them. See *Behnam v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 798 at paragraph 6: The officer merely has to inform the applicant that she considered the request for substitution of evaluation. That was done in this case.

[16] In this case, the reasons set out that the Officer considered the Applicant's request for a substituted evaluation. The Officer then stated that basis for denying the request: that she or he was not satisfied that substituted evaluation was warranted as the points awarded were an accurate reflection of the Applicant's ability to settle in Canada. While short, these reasons fulfill the two main functions as set out in *Ragupathy*, above. There is no basis for this Court to intervene.



**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

1. this application for judicial review is dismissed; and
2. there is no award for costs.

“ D. G. Near ”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-2190-09

**STYLE OF CAUSE:** WICKRAMASEKERA ET AL. v. MCI

**PLACE OF HEARING:** TORONTO

**DATE OF HEARING:** FEBRUARY 4, 2010

**REASONS FOR JUDGMENT  
AND JUDGMENT BY:** NEAR J.

**DATED:** FEBRUARY 26, 2010

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