Federal Court  Cour fédérale

Date: 20111116

Docket: IMM-1462-11

Citation: 2011 FC 1315

Ottawa, Ontario, November 16, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SHAMSUN NAHER CHOWDHURY

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 the decision of an Immigration Officer at the High Commission of Canada in Singapore, dated 1 December 2010 (Decision), which refused the Applicant's application for permanent residence under subsection 75(1) of the *Immigration and Refugee Protection Regulations* SOR/2002-227 (Regulations).

BACKGROUND

[2] The Applicant is a citizen of Bangladesh. On 25 November 2009 she applied for permanent residence as a member of the Federal Skilled Worker Class under subsection 75(1) of the Regulations.

[3] The Applicant submitted certified copies of her secondary school diplomas, Bachelor's degree, and MBA to prove her education credentials. She submitted a certified copy of her transcript from Stamford University, Bangladesh related to her MBA which showed that she had completed 66 credit hours of instruction as of 24 December 2008. The Applicant also submitted a letter from Professor Dr. Jamal Uddin Ahmed, an academic advisor at Stamford University, Bangladesh. The letter indicated that the Applicant had registered in 2006 and had studied for two years. She also submitted Form IMM0008 – Schedule 1: Background Information (IMM0008) with her application. She indicated on that form that she had studied and completed a two-year MBA course on a full-time basis between January 2006 and August 2008. She also wrote on IMM0008 that she had worked full-time as a financial auditor between 2005 and 2008.

[4] The Certified Tribunal Record (CTR) shows that the Applicant provided a letter from Quazi Saiful Islam (Islam) to prove her adaptability to Canada under subparagraph 83(5)(*a*)(vi) of the Regulations. The letter says that Islam, a permanent resident of Canada, is the Applicant's uncle. He enclosed with the letter a family tree which shows that he and the Applicant's mother, Sayeeda Begum, are both children of their father, Quazi Fazlul Karim, and their mother, Quazi Heron Nessa. The Applicant also submitted an affidavit birth certificate for Islam and a copy of her birth certificate to prove that he was her uncle. The CTR does not, however, disclose a birth certificate for

the Applicant's mother, though the Applicant's uncle says in his letter that such a birth certificate is enclosed.

[5] On 28 April 2010, the Applicant's immigration consultant sent a letter to the High Commission in Singapore. In this letter, the Applicant – through the consultant – requested that "if it should be determined that if the Applicant does not meet the required pass mark, it is respectfully requested that consideration under subsections 76(3) and (4) be given to the application of 'substituted evaluation' since as a points assessment […] would not be a sufficient indication of the applicants [sic] ability to become economically established in Canada."

[6] The Officer assessed the application on 24 November 2010. She awarded 61 points and refused the application because the Applicant did not attain the required 67 points for immigration to Canada. The Officer notified the Applicant of her Decision by letter dated 1 December 2010.

DECISION UNDER REVIEW

[7] The Decision in this case consists of the Officer's refusal letter dated 1 December 2010 and her CAIPS notes on the file.

[8] The Officer awarded the Applicant a total of 61 points as follows:

Category	**Points assessed**	**Maximum**
Age	10	10
Education	22	25
Official language proficiency	08	24
Experience	21	21
Arranged employment	0	10
Adaptability	0	10
TOTAL	61	100

[9] The two assessments which are in issue in this application are the Officer's award of points in the Education and Adaptability categories.

Education

[10] The Officer awarded the Applicant 22 points for education based on her conclusion that the Applicant's highest credential was a Master's Degree with the equivalent of 16 years of full-time education. Under subparagraph 78(2)(*e*)(ii) of the Regulations, 22 points are awarded for two or more university level credentials at the Bachelor's level and a total of at least 15 years of completed full-time or full-time equivalent studies.

[11] The Officer noted that the Applicant had taken 2 years to complete her MBA while she was working full time as an auditor and concluded that the Applicant's "MBA is likely a year course and therefore [the Applicant] completed 16 [years] of education with a [sic] MBA."

Adaptability

[12] The Officer said in the refusal letter that the Applicant was single, did not have arranged employment, and had never studied or worked in Canada. She also said that the Applicant claimed to have an uncle in Canada. The Officer concluded that this relationship was not established because the Applicant had not provided birth certificates for her parents. The CAIPS notes show that the uncle's permanent resident card, affidavit birth certificate, letter, and family tree were before the Officer. The Officer awarded no points for adaptability.

[13] The Officer refused the Application because the 61 points awarded did not meet the 67 point threshold for immigration to Canada. She did not consider a substitute assessment under subsections 76(3) or (4).

ISSUES

[14] The Applicant raises the following issues:

a. Whether the Officer's conclusion that her MBA was only one year was reasonable;

b. Whether the Officer's conclusion that the relationship between Islam and the Applicant was not established was reasonable;

c. Whether the Applicant was denied procedural fairness;

d. Whether the Officer erred when she did not consider a substitute evaluation.

RELEVANT LEGISLATION

[15] The following provision of the Act is applicable in this proceeding:

Selection of Permanent Residents	**Sélection des résidents permanents**
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.

[16] The following provisions of the Regulations are also applicable in these proceedings:

Federal Skilled Worker Class	**Travailleurs qualifiés (fédéral)**
75. (1) For the purposes of	75. (1) Pour l'application du

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.

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.

Selection criteria

Critères de selection

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,

…

…

(vi) adaptability, in accordance with section 83;

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

…

…

(3) Whether or not the skilled worker has been awarded the minimum number of required

(3) Si le nombre de points obtenu par un travailleur qualifié — que celui-ci obtienne

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.

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.

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

…

…

Selection Grid

Grille de selection

78. (1) The definitions in this subsection apply in this section.

78. (1) Les définitions qui suivent s'appliquent au présent article.

"full-time" means, in relation to a program of study leading to an educational credential, at least 15 hours of instruction per week during the academic year, including any period of training in the workplace that forms part of the course of instruction.

« temps plein » À l'égard d'un programme d'études qui conduit à l'obtention d'un diplôme, correspond à quinze heures de cours par semaine pendant l'année scolaire, et comprend toute période de formation donnée en milieu de travail et faisant partie du programme.

"full-time equivalent" means, in respect of part-time or accelerated studies, the period that would have been required to complete those studies on a full-time basis.

« équivalent temps plein » Par rapport à tel nombre d'années d'études à temps plein, le nombre d'années d'études à temps partiel ou d'études accélérées qui auraient été nécessaires pour compléter des études équivalentes.

Education

(2) A maximum of 25 points shall be awarded for a skilled worker's education as follows:

…

(e) 22 points for

(i) a three-year post-secondary educational credential, other than a university educational credential, and a total of at least 15 years of completed fulltime or full-time equivalent studies, or

(ii) two or more university educational credentials at the bachelor's level and a total of at least 15 years of completed full-time or full-time equivalent studies; and

(f) 25 points for a university educational credential at the master's or doctoral level and a total of at least 17 years of completed full-time or full-time equivalent studies.

Special Circumstances

(4) For the purposes of subsection (2), if a skilled worker has an educational credential referred to in paragraph (2)(b), subparagraph (2)(c)(i) or (ii), (d)(i) or (ii) or (e)(i) or (ii) or paragraph (2)(f),

Études

(2) Un maximum de 25 points d'appréciation sont attribués pour les études du travailleur qualifié selon la grille suivante:

…

e) 22 points, si, selon le cas :

(i) il a obtenu un diplôme postsecondaire — autre qu'un diplôme universitaire — nécessitant trois années d'études et a accumulé un total de quinze années d'études à temps plein complètes ou l'équivalent temps plein,

(ii) il a obtenu au moins deux diplômes universitaires de premier cycle et a accumulé un total d'au moins quinze années d'études à temps plein complètes ou l'équivalent temps plein;

f) 25 points, s'il a obtenu un diplôme universitaire de deuxième ou de troisième cycle et a accumulé un total d'au moins dix-sept années d'études à temps plein complètes ou l'équivalent temps plein.

Circonstances spéciales

(4) Pour l'application du paragraphe (2), si le travailleur qualifié est titulaire d'un diplôme visé à l'un des alinéas (2)b), des sous-alinéas (2)c)(i) et (ii), (2)d)(i) et (ii) et (2)e)(i) et (ii) ou à l'alinéa (2)f) mais

but not the total number of years of full-time or fulltime equivalent studies required by that paragraph or subparagraph, the skilled worker shall be awarded the same number of points as the number of years of completed full-time or full-time equivalent studies set out in the paragraph or subparagraph.

n'a pas accumulé le nombre d'années d'études à temps plein ou l'équivalent temps plein prévu à l'un de ces alinéas ou sous-alinéas, il obtient le nombre de points correspondant au nombre d'années d'études à temps plein complètes — ou leur équivalent temps plein – mentionné dans ces dispositions.

…

…

Adaptability

Capacité d'adaptation

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 ciaprès, selon le nombre indiqué:

…

…

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

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

Family relationships in Canada

Parenté au Canada

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

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

(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

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

person who is a Canadian citizen or permanent resident living in Canada and who is	ou, dans le cas où il l'accompagne, est ainsi unie à son époux ou conjoint de fait:
…	…
(vi) a child of the father or mother of their father or mother, other than their father or mother,	(vi) un enfant de l'un des parents de l'un de leurs parents, autre que l'un de leurs parents,

STANDARD OF REVIEW

[17] The Supreme Court of Canada in *Dunsmuir v New Brunswick,* 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a 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.

[18] In *Kniazeva v Canada (Minister of Citizenship and Immigration)* 2006 FC 268, Justice Yves de Montigny held that the assessment of an application for permanent residence under the Federal Skilled Worker Class is an exercise of discretion that should be given a high degree of deference. Further, in *Persaud v Canada (Minister of Citizenship and Immigration)* 2009 FC 206, Justice John O'Keefe held that the appropriate standard of review for a determination under the Federal Skilled worker class is reasonableness. See also *Tong v Canada (Minister of Citizenship and Immigration)* 2007 FC 165. The standard of review on the first two issues is reasonableness.

[19] 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." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa,* 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only 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."

[20] In *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour),* 2003 SCC 29, the Supreme Court of Canada held that the standard of review with respect to questions of procedural fairness is correctness. Further, the Federal Court of Appeal in *Sketchley v Canada (Attorney General)* 2005 FCA 404 at paragraph 53 held that the "procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty." The Standard of review on the third issue is correctness.

[21] The Applicant challenges the Officer's failure to consider a substitute evaluation under subsection 76(3) of the Regulations. In *Fernandes v Canada (Minister of Citizenship and Immigration)* 2008 FC 243, Justice Barry Strayer had this to say on the issue, at paragraph 8:

> What is being alleged here is the failure of the Visa Officer to consider the question of whether the discretion should be exercised, not that it was exercised wrongly. While a failure to exercise the discretion has often been treated as a breach of procedural fairness (see e.g. *Nayyar, supra*, at para. 8) it appears to me to involve a question of law: namely has the Visa Officer taken every step that the law requires? In either case the standard of review is correctness and that is a standard I will apply to this issue.

[22] Justice David Near, in *Miranda v Canada (Minister of Citizenship and Immigration)* 2010 FC 424 relied on *Fernandes* and held at paragraph 9 that the standard of review with respect to an officer's consideration of a request for a substituted evaluation under subsection 76(3) of the Regulations is correctness. Where an applicant requests a substituted evaluation the officer processing the application must consider the request. I am satisfied that the standard of review on the third issue in this case is correctness.

[23] In *Dunsmuir*, above, the Supreme Court of Canada held at paragraph 50 that

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

ARGUMENTS OF THE PARTIES

The Applicant

The Officer's Conclusion that the Applicant's MBA was Only One Year was Unreasonable

[24] The Applicant says the Officer erred when she awarded only 22 points for education and that the Officer ignored all the educational records she submitted with her application. She relies on *Hasan v Canada (Minister of Citizenship and Immigration)* 2010 FC 1206 for the proposition that the last degree must be assessed together with an applicant's complete academic history. The Applicant notes that the transcript she submitted with her application shows that she completed 66 credit hours of instruction between 2006 and 2008. She says that it was unreasonable for the Officer

to conclude that 66 credit hours of instruction, though it was taken while she was working full-time as an auditor, only amounted to one year of full-time equivalent study

The Officer's Conclusion on the Relationship with the Applicant's Uncle was Unreasonable

[25] The Applicant argues that the Officer's conclusion that the relationship with Islam was not established was unreasonable because it was made in ignorance of the evidence before her and was based on a denial of procedural fairness.

The Conclusion Ignored Evidence

[26] The conclusion that her relationship with her uncle had not been established was unreasonable because the Officer did not rely on the family tree provided by the uncle. She says that, even if her mother's birth certificate was not before the Officer, the Officer should have concluded that the relationship was established based on the family tree alone. For the Officer not to so conclude was unreasonable.

The Applicant was Denied Procedural Fairness

[27] The Officer's conclusion on the relationship between the uncle and the Applicant was based on the fact that there was no birth certificate for the Applicant's mother in the CTR. The Applicant says that she submitted a complete application to her consultant, including her mother's birth certificate. When the consultant submitted the Application, this birth certificate was missing. The Applicant says this created an evidentiary doubt which the Officer had a duty to inquire into. She says that *Sandhu v Canada (Minister of Citizenship and Immigration)* 2010 FC 759 teaches that, where there is any evidentiary doubt, the Officer has a duty to clarify matters with the Applicant.

She also says that *Zheng v Canada (Minister of Citizenship and Immigration)* 2008 FC 430 teaches that officers must clarify any obvious errors with applicants before making a negative decision. When she noticed that the birth certificate was missing, the Officer had a duty to clarify the situation with the Applicant before making a negative decision. The Officer breached the Applicant's right to procedural fairness when she did not give the Applicant the opportunity to respond to her concern.

[28] The Applicant also relies on *Hernandez v Canada (Minister of Citizenship and Immigration)* 2004 FC 1398 for the proposition that an applicant must be afforded the opportunity to provide missing documents. The Officer breached the Applicant's right to procedural fairness when she did not give her the opportunity to present the missing birth certificate.

[29] The Applicant also says that she was denied natural justice by the combination of the Officer's failure to inquire about the missing birth certificate and her consultant's failure to present the complete file to the High Commission. She has been prejudiced because the Minister of Citizenship and Immigration, in June 2011, eliminated the occupation classification she applied under and she cannot apply under any other classification. She says this will preclude her from applying again with updated information, so she was prejudiced by the Officer's failure to inquire and her consultant's failure to submit the completed Application.

The Officer Erred by Not Considering a Substituted Assessment

[30] Finally, the Applicant argues that the Officer erred when she failed to consider a substituted assessment under subsections 76(3) and (4) of the Regulations. She says that the Officer should have considered her settlement fund of CDN$30,000 in a substitute assessment. She says that *Choi v Canada (Minister of Citizenship and Immigration)* 2008 FC 577 teaches that a substituted

assessment can include the factors under subsection 76(1) as well as any settlement funds which an applicant holds.

The Respondent

[31] The Respondent says that where statutory discretion has been exercised by a visa officer in good faith and in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purposes, the court should not interfere. See *Maple Lodge Farms Ltd. v Canada*, [1982] 2 SCR 2 for the proposition.

The Officer's Conclusion on the Applicant's MBA was Reasonable

[32] The Respondent says that the Officer's decision to award 22 points for education and not 25 points was correct based on her conclusion that the Applicant's MBA was the equivalent of one year of full-time study. The Officer's finding that the Applicant had 16 years of full-time study was reasonable. She accepted that the Applicant had a Bachelor's degree; her conclusion that the MBA was equivalent to one year of full-time study was reasonable because it was based on the evidence before her. As the Applicant noted in IMM0008, she was working full-time while she completed her MBA. The Officer followed the approach set out in *Shahid v Canada (Minister of Citizenship and Immigration)* 2011 FCA 40 at paragraphs 29 and 30 when she evaluated the Applicant's MBA:

> Thus for example, a person who engages in part-time studies and obtains a university degree after two years of studies, in circumstances where the same degree can be obtained on a full-time basis after one year, will be credited with having been engaged in a program of study of "at least 15 hours of instruction per week" during a single year. Conversely, a person who engages in accelerated studies and obtains a university degree after one year of studies, in circumstances where the same degree is obtained on a full-time basis over the course of two years, is credited with having

> been engaged in a program of study of "at least 15 hours of instruction per week" over two years.
>
> The net result is that a person who obtains a degree through "part-time or accelerated studies" is deemed to have studied the equivalent number of hours as someone who obtained the same degree on a full-time basis. Significantly, no other form of equivalency is created by the definition.

The Officer followed the proper approach and concluded that the Applicant had 16 years of education. Subparagraph 78(2)(*e*)(ii) requires an award of 22 points for 16 years of education, which is what the Officer awarded.

There was no Breach of Procedural Fairness

[33] An officer has no obligation to notify applicants about concerns that they might not attain 67 points and no obligation to give applicants the opportunity to respond to those concerns. In *Ahmed v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 940 Justice Marshall Rothstein said at paragraph 8 that

> [Nor do I accept] counsel's submissions that a visa officer has an obligation to notify an applicant of her concerns that he might not attain 70 units of assessment and allow him an opportunity to satisfy those concerns. Such submission is tantamount to saying that any time a visa officer thinks an applicant for permanent residence might be refused, he or she must disclose the expected decision in advance and give the applicant a second chance to meet requirements. While nothing prevent a visa officer for doing so, there is no such obligation on the officer (see for example *Prasad v. M.C.I.*, [1996] F.C.J. No. 453, IMM-3373-94, April 2, 1996 (F.C.T.D.)).

[34] The Respondent also says that that the jurisprudence is clear that applicants will be held to their choice of advisors. In *Frenkel v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No. 96, Prothonotary Hargrave held at paragraph 10, that "the client must bear the consequences of having hired poor counsel." Further, that case teaches that professional

incompetence should generally to be dealt with by professional bodies and the courts will only intervene in exceptional cases. The Respondent also relies on the statement by Justice Denis Pelletier in *Cove v Canada (Minister of Citizenship and Immigration)* 2001 FCT 266, at paragraph 10 that

> The consequences to their clients of non-performance will be the same as it is for clients of the immigration bar. There is no reason why the Court should shelter consultants from negligence claims by overlooking their mistakes.

The Applicant cannot now claim that she was denied natural justice or procedural fairness because she made a poor choice of counsel.

There was no Obligation to Consider a Substitute Evaluation

[35] The Respondent agrees with the Applicant that officers have the authority to consider a substituted assessment of their own volition or on the request of an applicant. However, *Eslamieh v Canada (Minister of Citizenship and Immigration)* 2008 FC 722 teaches that officers are only under an obligation to consider a substituted assessment when they are specifically requested to do so. The Applicant did not make such a request, so it was not an error for the Officer not to consider a substituted assessment.

ANALYSIS

Education

[36] First, the Applicant claims the Officer erred in her assessment of her education. The Applicant relies on her submission that she obtained a Master's Degree and had 17 years of total education. Under the Regulations, this would entitle her to 25 points. However, the Officer found

that the Applicant only had a total of 16 years of total education in addition to her Master's Degree, thus deserving only 22 points.

[37] The proper number of points awarded depends entirely on whether the Applicant's Master's Degree counted as two years of full-time education as claimed by the Applicant, or was the equivalent of one year of full-time studies as found by the Officer.

[38] The Officer found that the Applicant was working full-time at the same time as obtaining her MBA. She therefore found that the Applicant's MBA was "likely a year course". This is a finding of fact and normally deserves deference. However, in this case, it appears that the Officer was more concerned with whether or not the Applicant was working full-time than with whether the MBA was a one-year degree or two.

[39] The Officer's Decision provides no indication that she considered the Applicant's MBA transcripts. Had she done so, the Officer would have known that the Applicant completed 66 credit hours for her MBA. This is a considerable number of credit hours to be completed in a single year, as the Officer found was "likely", and supports the Applicant's claim of two years of full-time study.

[40] Based on the evidence that was before the Officer, I conclude that the Officer's assessment of the Applicant's education was not reasonable. The Officer was required to consider all the evidence before her, yet there is nothing in the Decision to indicate that she was alert to the actual credit hours completed by the Applicant.

[41] However, as noted by the Respondent, such a finding would increase the Applicant's total score by only three points. The Applicant would still fail to meet the 67 points required.

Adaptability

[42] The Applicant raises several issues with regards to the Officer's decision to award 0 points under the adaptability category.

[43] The Officer made her decision not to award any points for adaptability based on a lack of documentation, specifically, the lack of the Applicant's parents' birth certificates. The Officer found that without these documents, the Applicant was unable to establish a relationship with her claimed uncle. The Officer was fully aware of, and alert to, the existence of the permanent resident card, family tree, affidavit and birth certificate of the claimed uncle. The Officer's finding that no relationship had been established is a factual decision and is subject to a standard of reasonableness. In this case, there is nothing to suggest that this finding was unreasonable provided the Officer had no duty to seek further input on this issue as a result of the uncle's letter which claims to enclose a birth certificate for the Applicant's mother.

[44] The Applicant claims that the Officer also had a duty to provide the Applicant with an opportunity to address any concerns the Officer had regarding the Applicant's relationship with her claimed uncle. As Justice Richard Mosley pointed out in *Hassani v Canada (Minister of Citizenship and Immigration)* 2006 FC 1283, [2007] 3 FCR 501 at paragraph 24:

> […] it is clear that where a concern arises directly from the requirements of the legislation or related regulations, a visa officer will not be under a duty to provide an opportunity for the applicant to address his or her concerns. Where however the issue is not one that arises in this context, such a duty may arise. This is often the case

> where the credibility, accuracy or genuine nature of information submitted by the applicant in support of their application is the basis of the visa officer's concern, as was the case in *Rukmangathan*, and in *John* […].

[45] In this case, the concerns of the Officer arose directly from the documentation, or lack thereof, submitted by the Applicant. This is not a case where the credibility or genuineness of a document was in issue. Instead, the Officer's decision was based on a lack of sufficient evidence.

[46] The case law is clear that, "the onus is on the applicant to file an application with all relevant supporting documentation and to provide sufficient credible evidence in support of his application. The applicant must put his 'best case forward.'" See *Oladipo v Canada (Minister of Citizenship and Immigration)* 2008 FC 366 at paragraph 24.

[47] The onus was on the Applicant to provide sufficient documentation to establish the relationship between the Applicant and her claimed uncle. Unfortunately for the Applicant, the birth certificates of the Applicant's parents were not before the Officer. The Officer took the supporting evidence that was submitted into consideration and found that the relationship could not be established.

[48] However, it is clear from the uncle's letter at page 66 of the CTR that the Applicant, through her uncle, felt she was submitting her mother's birth certificate. If the Officer read this letter, which he should have, he would have been aware that an obvious error had been made. Yet the Officer did not inform the Applicant of this error or give her a chance to rectify it.

[49] It seems to me extremely unfair to penalize an applicant in this way. The evidence is clear that the Applicant intended to enclose the birth certificate and that she believed it had been enclosed. She thought she had provided the Officer with precisely the evidence he said he needed. As Justice Dolores Hansen held in *Amin v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No. 1221, at paragraph 11,

> Although a visa officer may not have a duty to counsel, advise or even seek clarification from an applicant, the visa officer does have the duty to "consider fully the submissions and information provided by an applicant".

On the facts of this case, the information before the Officer was that the birth certificate was available and the Applicant believed it had been submitted. I see no indication that the Officer considered this fact. He simply penalized the Applicant on the basis of an obvious error that could have been easily rectified.

[50] The Applicant also submits that she should not bear the costs or burden of an omission made by her consultant. The Court cannot accept this argument.

[51] Generally speaking, "applicants will be held to the consequences of their choice of advisor…." See *Cove*, above. Also, there is no evidence that the Applicant's consultant was the source of the omission and not the Applicant herself. Regardless, the birth certificate was not before the Officer when she made her Decision.

[52] Taken individually, the Officer's awards of points for education and adaptability would not put the Applicant over the 67 point threshold. However, if these errors had not been made the

Applicant could have scored a total of 69 points and been granted a permanent resident visa. I think this requires that the application be returned for reconsideration.

Was the Officer Required to Conduct a "Substituted Evaluation" Under Subsection 76(3) of the Regulations?

[53] The final issue of this case is whether the Officer owed a duty to exercise her discretion to consider an alternative evaluation under subsection 76(3) of the Regulations. If such a duty existed, and the Officer breached it, the application must be returned for reconsideration.

[54] Justice Michael Kelen discussed the discretion held by a visa officer under subsection 76(3) of the Regulations in *Choi*, above, at paragraph 15. He said that,

> Under subsection 76(3) of the Regulations, a visa officer may substitute the points assessment with his or her own evaluation of an applicant's likelihood of becoming economically established in Canada. Such a power is discretionary under the Regulations and may be performed "if the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada."

[55] The Respondent relies on *Eslamieh*, above, to the effect that visa officers have the authority to consider an alternative evaluation under subsection 76(3) of the Regulations of their own volition, but are not obligated to consider this option unless requested to do so. This is consistent with Justice Frederick Gibson's decision in *Nayyar v Canada (Minister of Citizenship and Immigration)* 2007 FC 199.

[56] In this case, the Applicant clearly requested an alternative or “substituted evaluation” under subsection 76(3) of the Regulations if she did not meet the required number of points. This request is found in the Certified Tribunal Record at page 32.

[57] The Respondent admits that where a request is made, the Officer’s duty to exercise her discretion under subsection 76(3) is engaged. The Respondent, however, makes no submissions regarding the Applicant’s request for a “substituted evaluation” and could not really point to anything that resembled a 76(3) assessment when the issue was raised at the hearing before me.

[58] There is no indication in the Decision that the Officer performed a “substituted evaluation” as requested once she determined the Applicant did not meet the required minimum of 67 points. When she failed to do so, the Officer breached the Applicant’s right to procedural fairness.

[59] The appropriate standard of review on this issue is correctness. The Officer’s decision to refuse the Applicant’s application was not correct so the matter ought to be remitted to another visa officer for re-determination.

[60] The parties agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different officer;
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-1462-11
STYLE OF CAUSE:	**SHAMSUN NAHER CHOWDHURY**
	- and -
	THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 4, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	November 16, 2011

APPEARANCES:

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