Federal Court  Cour fédérale

Date: 20170428

Docket: IMM-3816-16

Citation: 2017 FC 423

Ottawa, Ontario, April 28, 2017

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SUBRAHMANYAM PILAKA VENKATA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 for judicial review of the decision of an immigration officer at the Embassy of Canada in Warsaw [Visa Officer], dated July 15, 2016 [Decision], which denied the Applicant's application for permanent residence as a member of the Federal Skilled Worker [FSW] class.

II. BACKGROUND

[2] The Applicant is a 39-year-old citizen of India. On November 26, 2014, he filed an application for permanent residence in Canada as a member of the FSW class. The application was received on December 1, 2014, which was one day after the Applicant turned 37-years-old.

[3] On March 24, 2015, the Central Intake Office reviewed the application and recommended substituted evaluation [SE]. The application was transferred to the visa office in Warsaw, Poland, where a visa officer decided that SE was not warranted.

[4] The application was refused on July 22, 2015 because the Applicant had obtained only 66 of the 67 points required. The Applicant commenced proceedings for judicial review of the decision, but the matter was settled on March 23, 2016, with the parties agreeing that the application should be reconsidered by a different visa officer.

[5] The Applicant received a procedural fairness letter on June 10, 2016. The letter advised that although the Applicant had requested his application be reviewed under SE, the visa officer concluded that SE was not warranted because the points awarded and information provided accurately reflected the Applicant's ability to establish himself economically in Canada. The letter also advised that the Applicant had 30 days to respond to the letter with additional information, which the Applicant did on June 27, 2016.

[6] On July 7, 2016, the Applicant's former representative, Borders Law Firm [Borders], requested an extension of the deadline to obtain and provide further evidence. The Applicant did not receive a response to this letter.

[7] On the same day, Citizenship and Immigration Canada [CIC] received a request from the Applicant that Borders be removed as a representative and for all future correspondence to be sent to his personal e-mail address. On July 15, 2016, CIC informed Borders that the Applicant had cancelled their appointment as a representative.

III. DECISION UNDER REVIEW

[8] The Decision sent from the Visa Officer to the Applicant by letter dated July 15, 2016 determined that the Applicant did not qualify for immigration to Canada as a member of the FSW class.

[9] The Visa Officer determined that under the assessment criteria set out in s 76(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*], the Applicant qualified for 66 of the 67 required points:

Criteria	Points Assessed
Age	10
Education	23
Experience	13
Arranged employment	0
Official language proficiency	20
Adaptability	0
Total	66

[10] The Visa Officer then acknowledged the Applicant's request for his application to be considered under SE. However, the Visa Officer determined that the points awarded were a sufficient indicator of the Applicant's ability to become economically established in Canada. The Visa Officer then noted that the Applicant had been informed of the decision that SE would not be used in a procedural fairness letter dated June 10, 2016 and that the response failed to satisfy the Visa Officer of his ability to become economically established. Accordingly, the Visa Officer concluded that the application would not be reviewed under SE.

[11] In the Global Case System Management [GCMS] notes, an entry dated June 10, 2016 detailed the points awarded to the Applicant. Under experience, the Applicant was awarded 13 points based on his previous employment as a civil engineer from March 2004 to May 2009, which totaled 5 years and 1 month. The entry also noted that although the Applicant had resided in Canada for over 5 years with authorization to work, there was no evidence that demonstrated he was able to secure employment and become economically established.

[12] With regards to the procedural fairness letter, the GCMS entries note that the Applicant's response to the letter was received on July 5, 2016 and additional documents were received July 6, 2016. In his response, the Applicant had stated that due to his 15 years of work experience in 5 countries and education, he felt confident that he could operate his own company in Canada. The Applicant also submitted evidence regarding his self-employment income from 2010 to 2014. However, the Visa Officer noted that the income during the periods of self-employment was minimal and that the Applicant's ability to obtain employment from 2010 to 2012 was insufficient.

[13] The GCMS entries also note that the Applicant's request for a change of mailing and addresses was received on July 7, 2016. On the same day, CIC received an e-mail request for an extension of time to provide additional documents, but noted that some documents had already been received and the matter was sent to the PM for review.

IV. ISSUES

[14] The Applicant submits that the following are at issue in this proceeding:

1. Did the Visa Officer commit a breach of procedural fairness by rendering a decision prior to responding to the Applicant's request for an extension of time?
2. Did the Visa Officer err in awarding points under the experience factor for which the Applicant was eligible and would have resulted in sufficient points to qualify for permanent residency?
3. Did the Visa Officer err in fact and law by misconstruing the Applicant's request for SE and ignore critical evidence which resulted in the request being denied?

V. STANDARD OF REVIEW

[15] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] 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 settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[16] As a matter of procedural fairness, the first issue regarding whether the Visa Officer should have responded to the Applicant's request for an extension of time before rendering a decision will be reviewed under the standard of correctness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*].

[17] The second and third issues regard a visa officer's assessment of an application for permanent residence, which involves questions of mixed fact and law and is reviewable under the standard of reasonableness: *Canada (Citizenship and Immigration) v Young*, 2016 FCA 183 at para 7; *Odunsi v Canada (Citizenship and Immigration)*, 2016 FC 208 at para 13.

[18] 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 para 47, and *Khosa*, above, at para 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."

VI. STATUTORY PROVISIONS

[19] The following provisions from the *Regulations* are relevant in this proceeding:

Selection criteria	**Critères de sélection**
76 (1) For the purpose of determining whether a skilled worker, as a member of the	76 (1) Les critères ci-après indiquent que le travailleur qualifié peut réussir son

federal skilled worker class, will be able to become economically established in Canada, they must be assessed on the basis of the following criteria:

établissement économique au Canada à titre de membre de la catégorie des travailleurs qualifiés (fédéral) :

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

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

(i) education, in accordance with section 78,

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

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

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

(iii) experience, in accordance with section 80,

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

(iv) age, in accordance with section 81,

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

(v) arranged employment, in accordance with section 82, and

(v) l’exercice d’un emploi réservé, aux termes de 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 one half of the minimum necessary income applicable in respect of the group of persons consisting of the skilled

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

worker and their family members, or

(ii) be awarded points under paragraph 82(2)(a), (b) or (d) for arranged employment, as defined in subsection 82(1), in Canada.

(ii) soit s'est vu attribuer des points aux termes des alinéas 82(2)a), b) ou d) pour un emploi réservé, au Canada, au sens du paragraphe 82(1).

Number of 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

Nombre de points

(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 the officer's substituted evaluation

(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

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

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

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.

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).

[…]

[…]

Conformity — applicable times

77 For the purposes of Part 5, the requirements and criteria set out in sections 75 and 76 must be met on the date on which an application for a permanent resident visa is made and on the date on which it is issued.

Application

77 Pour l'application de la partie 5, les exigences et critères prévus aux articles 75 et 76 doivent être remplis au moment où la demande de visa de résident permanent est faite et au moment où le visa est délivré.

[…]

[…]

Experience (15 points)

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

Expérience (15 points)

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

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

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

(b) 11 points for two to three years of work experience;	b) 11 points, pour deux à trois années d'expérience de travail;
(c) 13 points for four to five years of work experience; and	c) 13 points, pour quatre à cinq années d'expérience de travail;
(d) 15 points for six or more years of work experience.	d) 15 points, pour six années d'expérience de travail et plus.

[20] The following provisions from the *Federal Courts Rules*, SOR/98-106 [*FCR*] are relevant in this proceeding:

Content of affidavits	**Contenu**
81 (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.	81 (1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

[21] The following provisions from the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [*FC CIRPR*] are relevant in this proceeding:

16 Where leave is granted, all documents filed in connection with the application for leave shall be retained by the Registry for consideration by the judge hearing the application for judicial review.	16 Lorsque la demande d'autorisation est accueillie, le greffe garde les documents déposés à l'occasion de la demande, pour que le juge puisse en tenir compte à l'audition de la demande de contrôle judiciaire.

[22] The following provisions from the *Canada Evidence Act*, RSC 1985, c C-5 [*CEA*]are relevant in this proceeding:

Application of this part	**Application**
52 This Part extends to the following classes of persons:	52 La présente partie s'applique aux catégories suivantes de personnes :
(a) officers of any of Her Majesty's diplomatic or consular services while performing their functions in any foreign country, including ambassadors, envoys, ministers, charges d'affaires, counsellors, secretaries, attaches, consuls general, consuls, vice-consuls, proconsuls, consular agents, acting consuls general, acting consuls, acting vice-consuls and acting consular agents;	a) les fonctionnaires de l'un des services diplomatiques ou consulaires de Sa Majesté, lorsqu'ils exercent leurs fonctions dans tout pays étranger, y compris les ambassadeurs, envoyés, ministres, chargés d'affaires, conseillers, secrétaires, attachés, consuls généraux, consuls, vice-consuls, proconsuls, agents consulaires, consuls généraux suppléants, consuls suppléants, vice-consuls suppléants et agents consulaires suppléants;
(b) officers of the Canadian diplomatic, consular and representative services while performing their functions in any foreign country or in any part of the Commonwealth and Dependent Territories other than Canada, including, in addition to the diplomatic and consular officers mentioned in paragraph (a), high commissioners, permanent delegates, acting high commissioners, acting permanent delegates, counsellors and secretaries;	b) les fonctionnaires des services diplomatiques, consulaires et représentatifs du Canada lorsqu'ils exercent leurs fonctions dans tout pays étranger ou dans toute partie du Commonwealth et territoires sous dépendance autre que le Canada, y compris, outre les fonctionnaires diplomatiques et consulaires mentionnés à l'alinéa a), les hauts commissaires, délégués permanents, hauts commissaires suppléants, délégués permanents

suppléants, conseillers et secrétaires;

(c) Canadian Government Trade Commissioners and Assistant Canadian Government Trade Commissioners while performing their functions in any foreign country or in any part of the Commonwealth and Dependent Territories other than Canada;

c) les délégués commerciaux du gouvernement canadien et les délégués commerciaux adjoints du gouvernement canadien lorsqu'ils exercent leurs fonctions dans un pays étranger ou dans toute partie du Commonwealth et territoires sous dépendance autre que le Canada;

(d) honorary consular officers of Canada while performing their functions in any foreign country or in any part of the Commonwealth and Dependent Territories other than Canada;

d) les fonctionnaires consulaires honoraires lorsqu'ils exercent leurs fonctions dans tout pays étranger ou dans toute partie du Commonwealth et territoires sous dépendance autre que le Canada;

(e) judicial officials in a foreign country in respect of oaths, affidavits, solemn affirmations, declarations or similar documents that the official is authorized to administer, take or receive; and

e) les fonctionnaires judiciaires d'un État étranger autorisés, à des fins internes, à recevoir les serments, les affidavits, les affirmations solennelles, les déclarations ou autres documents semblables;

(f) persons locally engaged and designated by the Deputy Minister of Foreign Affairs or any other person authorized by that Deputy Minister while performing their functions in any foreign country or in any part of the Commonwealth and Dependent Territories other than Canada.

f) les employés engagés sur place et désignés par le sous-ministre des Affaires étrangères ou toute autre personne autorisée par lui à procéder à une telle désignation lorsqu'ils exercent leurs fonctions dans tout pays étranger ou dans toute partie du Commonwealth et des territoires sous sa dépendance autre que le Canada.

Oaths taken abroad

Serments déférés à l'étranger

53 Oaths, affidavits, solemn affirmations or declarations administered, taken or received outside Canada by any person mentioned in section 52 are as valid and effectual and are of the like force and effect to all intents and purposes as if they had been administered, taken or received in Canada by a person authorized to administer, take or receive oaths, affidavits, solemn affirmations or declarations therein that are valid and effectual under this Act.	53 Les serments, affidavits, affirmations solennelles ou déclarations déférés, recueillis ou reçus à l'étranger par toute personne mentionnée à l'article 52 sont aussi valides et efficaces et possèdent la même vigueur et le même effet, à toutes fins, que s'ils avaient été déférés, recueillis ou reçus au Canada par une personne autorisée à y déférer, recueillir ou recevoir les serments, affidavits, affirmations solennelles ou déclarations qui sont valides ou efficaces en vertu de la présente loi.

VII. ARGUMENTS

A. *Applicant*

(1) Procedural Fairness

[23] The Applicant submits that the Visa Officer committed a breach of procedural fairness by rendering a decision prior to responding to the Applicant's request for an extension of time. The jurisprudence demonstrates that where an applicant requests an extension of time and receives no response, it is a breach of procedural fairness for a decision to be rendered prior to the expiry of that extension and the matter must be sent back for redetermination: *Hussain v Canada (Citizenship and Immigration)*, 2012 FC 1199 at paras 6-11 [*Hussain*].

[24] In the present case, the Visa Officer confirmed that the Applicant's request for an extension of time to provide additional documentation in response to the procedural fairness

letter was received on July 7, 2016. Yet three days later, the Visa Officer rendered a decision without responding to the Applicant's request. As a result, the Applicant did not have the opportunity to provide additional documents. Although the Visa Officer noted that certain documents had been provided, this does not absolve the Visa Officer of the responsibility to respond to the request because the Applicant had clearly requested additional time to provide a full and complete response. The Applicant submits that judicial intervention is warranted on this error alone.

(2) Points Awarded

[25] The Applicant also submits that the Visa Officer erred in awarding points under the experience factor for which the Applicant was eligible. The Visa Officer determined that under s 80(1) of the *Regulations*, the Applicant was only entitled to 13 points; however, at the time of the decision, the Applicant had over 6 years of relevant experience and was entitled to 15 points. The Applicant's response to the procedural fairness letter requested that his additional experience from December 2014 to the present be considered.

[26] The Court has held that for the purposes of evaluating work experience, a visa officer must evaluate the application for permanent residence on the basis of the facts as they stand at the time of the exercise of that discretion: *Belousyuk v Canada (Citizenship and Immigration)*, 2004 FC 746 at paras 17-19 [*Belousyuk*]. The Applicant submits that there is no room for discretion regarding governing points under the *Regulations*. If the Applicant had received 15 points for experience, he would have obtained 68 points and qualified for permanent residence. The Applicant submits that this error of law warrants judicial intervention.

(3) Request for SE

[27] The Applicant also submits that the Visa Officer erred in fact and law by misconstruing the Applicant's request for a SE as a request to be granted additional points under the factor of age, which resulted in the denial of the request. The Applicant had requested "the use of a substituted evaluation based on a holistic analysis of the applicant's ability to establish himself economically in Canada" under s 76(3) of the *Regulations*.

[28] This Court has held that when a visa officer makes a SE, the visa officer does so in lieu of the usual criteria of points earned; in other words, an exception is made under s 76(3) to consider factors in addition to those numerated under s 76(1)(a): *Xu v Canada (Citizenship and Immigration)*, 2010 FC 418 at para 18; *Kisson v Canada (Citizenship and Immigration)*, 2010 FC 99 at para 13; *Choi v Canada (Citizenship and Immigration)*, 2008 FC 577 at para 20.

[29] Accordingly, the Applicant submits that the Visa Officer misunderstood the request. He had stated that the fact that he was 36-years-old a mere day before the application was received was a better indicator of his ability to become economically established than the corresponding points awarded for applicants who are 37-years-old. The Visa Officer did not conduct a SE; instead, the Visa Officer considered the points grid and only took into account the factors listed under s 76(1)(a) of the *Regulations*.

[30] Given that the Applicant was prevented from adducing additional information due to the breach of procedural fairness, the Applicant submits that the Visa Officer's Decision was not reasonable.

B. *Respondent*

(1) Reasonableness

[31] The Respondent takes the position that the Decision is reasonable and in accordance with the law. Under ss 77 and 81 of the *Regulations*, candidates are entitled to be assessed as of the date on which the application is made. With regard to experience obtained after the date of the application, s 80(1) of the *Regulations* specifies that points are awarded for work experience "within 10 years before the date on which their application is received." Similarly, the *Regulations* provide that age is to be assessed on the date of the application. Consequently, the Applicant's request to be assessed on dates other than the date of the application is without legal basis.

[32] With regards to the issue of SE, the Respondent argues that the decision to forego SE was reasonable. The Visa Officer's assessment found that the Applicant, who had failed to meet the minimum required points, did not demonstrate that the points assessment was an inaccurate reflection of his chances of successful economic integration in Canada. The Visa Officer also noted that the Applicant had not become successfully established despite living in Canada for several years. Upon review of all the material, including documentation that the Applicant had to

be prompted to provide via a procedural fairness letter and the Applicant's rationale for a positive SE, the Visa Officer reasonably found that SE was not warranted.

(2) Rebuttal of Applicant's Submissions

[33] With regards to the Applicant's claim that the request for an extension of time to respond to the procedural fairness letter was not addressed, the Respondent submits that neither he nor his authorized representative made the request. While Borders sent a request on July 7, 2016, the request was unauthorized as the Applicant had notified CIC of a change of representative on the same day. The Applicant's personal reconsideration letter dated July 15, 2016 confirms that Borders acted without the Applicant's knowledge and authorization because the letter contained no reference to the request for an extension of time or indication that he wanted to adduce additional material. Consequently, the Visa Officer did not err in not responding to the request from Borders. The jurisprudence cited by the Applicant is not helpful as it considers a valid request from the applicant; in the present case, the request was not valid. The Applicant misrepresents the request as one initiated by him, when it was actually initiated by a former representative without authorization.

[34] As to the matter of the assessment of points, the Respondent argues that there is no basis in law for the claim that the Visa Officer should have assessed the Applicant's work experience as of the date of assessment rather than the date of application. The Applicant seeks contradictory positions on the appropriate date as he requests his age to be considered as of the date of application but his experience to be considered as of the date of assessment. The reliance on *Belousyuk*, above, is misplaced because the Court in that decision did not involve an

application under the FSW class and does not state that work experience can continue to accrue after the date of application. The *Regulations* are clear in that assessment of points for full-time work experience concerns the 10 years prior to the date on which the application is made.

[35] On the issue of SE, the Respondent contends that the Applicant's arguments are baseless. The GCMS notes demonstrate that the Visa Officer reviewed whether the Applicant's case accurately reflected his chances of successful establishment. Given that the Applicant did not provide evidence of prior successful establishment, the Visa Officer determined that the Applicant should still be rejected, which shows the Visa Officer considered all material, not just an assessment of points. The Respondent submits that the Applicant seeks to argue an unfavourable result but the facts demonstrate no arguable issue of law.

C. *Applicant's Reply*

(1) Validity of Request for Extension of Time

[36] The Applicant disagrees with the Respondent's submission that the Applicant had sent a notice of change of representative. The GCMS notes demonstrate that on the same day that the request for an extension was received, the required form to cancel the Applicant's appointment of representative was incomplete. There is no evidence that demonstrates the Applicant completed the notice of change of representative. The Respondent concedes that the request was ignored, but argues that this was justified because the request was unauthorized. However, the record shows that at the time of the request, Borders was still the authorized representative; accordingly, the request was valid. Additionally, neither Borders nor the Applicant were notified

that CIC would ignore the request for an extension of time. As a result, the Applicant relies on his prior submissions that the failure to respond to the request for an extension of time is a breach of procedural fairness that prevented him from adducing additional documentation.

(2) Jurisprudence on Points Assessment

[37] The Applicant also refutes the claim that the submissions on the Visa Officer's assessment of points has no basis in law. The Applicant has cited several cases, including *Belousyuk*, above, that indicate the Visa Officer incorrectly interpreted s 80(1) of the *Regulations*. The Applicant clearly requested that his additional work experience be considered, which is supported by jurisprudence that states that visa officers must evaluate applications on the facts as they exist at the time of assessment. If the Visa Officer had complied with this request, and thereby made an assessment in compliance with both the *Regulations* and the jurisprudence, the Applicant would have received 68 points and qualified for permanent residence. Consequently, the Visa Officer's failure to do so is an error in law.

(3) Reasonableness of SE Decision

[38] The Applicant also counters the Respondent's claim that the Visa Officer's decision not to use a SE was reasonable. The Applicant had requested a SE, which would consider factors outside of those enumerated in s 76(1)(a) of the *Regulations*. The Visa Officer misconstrued this request as a request for additional points under the age factor, which is listed under s 76(1)(a) of the *Regulations*. Given that the Visa Officer ignored the request for an extension of time and rendered a decision without allowing the Applicant an opportunity to adduce additional

information regarding SE, the Decision is in breach of procedural fairness and is also unreasonable. The Applicant also points out that this is the second judicial review required for his application.

D. *Applicant's Further Argument*

(1) Validity of Request for Extension of Time

[39] The Applicant continues to argue that the Visa Officer ignored a valid request for an extension of time and rendered a decision, which is a breach of procedural fairness. The certified tribunal record demonstrates that the request was made on July 7, 2016 by Borders on behalf of the Applicant and that a completed form IMM 5476 to remove Borders as an authorized representative was received on July 13, 2016. The form states that the form must be used if an application wishes to cancel the appointment of the authorized representative; the GCMS entry dated July 7, 2016 repeats these instructions. The Applicant followed the instructions and returned the form on July 11, 2016; however, he did not request that the extension of time sought on his behalf of the representative be cancelled as well. Consequently, the request was valid.

[40] The Applicant submits that CIC should not be allowed to justify its choice to ignore the request by retroactively applying the form to the day the request was received. CIC did not receive and was not notified of the cancellation of the authorized representative until July 13, 2016, a week after the request. Accordingly, CIC should have at least informed the Applicant that the request would not be processed. The Applicant points out that the Respondent has not provided further information as to why a valid request for an extension of time by an

authorized representative was not responded to prior to refusing the application only eight days after receipt of that valid request.

(2) Points Assessment

[41] Next, the Applicant cites the 2014 version of s 80(1) of the *Regulations* to show that 15 points should be awarded for six or more years of full-time work experience within the 10 years before the date on which the application is made. CIC's Overseas Processing manual [OP] provides that the work experience must have occurred during the 10 years immediately preceding the date of application and that officers must take into account any years of experience that occur between application and assessment and for which the applicant has submitted the necessary documentation. The OP has been cited with approval by this Court in *Dash v Canada (Citizenship and Immigration)*, 2010 FC 1255, which held that post-application experience is not relevant until an applicant meets the minimum requirements at the time the application is made as well as the time that the visa is issued.

[42] The Applicant submits that although the most recent version of the OP does not require visa officers to take into account post-application work experience, there is no indication that the instruction from the previous OP no longer applies. Additionally, there is no substantive change in the legislative provision addressing the award of points for work experience to justify such a change in the interpretation that points ought to be awarded for post-application work experience when the necessary supporting documentation is submitted. As a result, the Respondent cannot assert that s 80(1) of the *Regulations* does not allow the consideration of post-application work

experience for the awarding of points, as this would be contrary to the previous interpretation endorsed in the previous version of the OP that was approved by this Court.

[43] Moreover, in *Hamid v Canada (Citizenship and Immigration)*, 2006 FCA 217 at para 49, the Federal Court of Appeal distinguished age, as opposed to other criteria such as employment experience, on the basis that age is outside of the control of the applicant and a lock-in for age would always favour the applicant. Thus, the jurisprudence is consistent in finding that a visa officer can consider many facts which occur after the date of application and must evaluate an application for permanent residence based on the facts of the case as they stand at the time of decision-making.

[44] In the present case, the Applicant specifically requested that his post-application experience be considered, which is supported by the OP and jurisprudence of this Court. As a result, the Visa Officer's failure to award the additional two points is a highly material error which cost the Applicant his eligibility to meet the minimum required points for permanent residence.

E. *Respondent's Further Argument*

(1) Admissibility of Affidavits

[45] The Respondent takes issue with the admissibility of the Applicant's affidavits on the basis that they were not properly sworn. The documents demonstrate that they were signed before an official that attested only to the Applicant's identity, not the contents. Documents that

are merely signed and not sworn or affirmed are not admissible affidavit evidence: s 81 of the *FCR*; s 14 of the *CEA*. Additionally, the Respondent submits that a random consular official at the Indian embassy in the jurisdiction in which the Applicant resides is not competent to swear evidence, as foreign officials are not listed among the categories of people who may swear others abroad: ss 52, 53 of the *CEA*.

(2) Validity of Request for Extension of Time

[46] The Respondent continues to take the position that the request for an extension of time was not authorized by the Applicant. Although CIC required the Applicant to complete a change of representative form to action his request, it does not follow that Borders continued as an authorized representative such that the request was authorized. The form requirements are merely to facilitate proper communication. The Applicant communicated to CIC that he would represent himself and to accept the Applicant's arguments on form requirements would be victory of form over substance. The Applicant seeks to exploit the fact that Borders sent the request on the same day that he indicated he did not wish Borders to represent him. The consideration of the validity of the request must be decided legally and principally.

[47] The facts of the case demonstrate that the Applicant dismissed Borders and intended to act on his own behalf, which is supported by the completed change of representative form and the fact that Borders had no further involvement in the Applicant's case. The fact that it took the Applicant days to comply with the formal requirements does not change the fact that Borders was dismissed by the Applicant. Since the request was not authorized, the Visa Officer was permitted to decline to respond. Furthermore, the Respondent notes that the Applicant has not

attested that Borders' request was authorized by him in any of the affidavits filed, which must be taken as a tacit acknowledgment that Borders was not acting within his authority.

(3) Points Assessment

[48] The Respondent reiterates that the *Regulations* permit the award of points for experience earned only up to the date of application. The portions of the OP cited by the Applicant are outside of context and do not demonstrate any error of law in the assessment of the application. However, the Respondent concedes that CIC may consider whether an applicant has obtained additional experience in the period since the application, provided that the minimum requirements of s 75(2) of the *Regulations* are met. This assessment is not a right under the *Regulations*, but a practice. The Visa Officer considered this practice, but after a complete review, concluded that there was insufficient evidence to support the Applicant's claims that he had obtained more work experience. The issue is therefore one of assessment of evidence and the Visa Officer was entitled to find the material relied upon by the Applicant to be insufficient, which distinguishes the present case from the other jurisprudence cited by the Applicant.

F. *Applicant's Written Submissions*

[49] The Applicant submits that his affidavits are admissible. They were both drawn in first person, confined only to facts within his personal knowledge, and are compliant with s 81 of the *FCR*. The consular officer who stamped and signed the affidavits falls within the class of persons described in s 52(e) of the *CEA*; thus, the affidavits are valid and effectual under s 53 of the *CEA*.

[50] Alternatively, if the affidavits are not valid under the *CEA*, the Applicant submits that procedural fairness and the interests of justice require the admission of the affidavits into evidence. Since the Respondent intends to challenge the Applicant's evidence or credibility, excluding the affidavits would deny the Applicant an opportunity to respond and lead to a breach of procedural fairness. Additionally, since the affidavits are part of the evidence upon which leave was granted for this judicial review, they must be retained for consideration by the judge hearing the application for judicial review: s 16 of the *FC CIRPR*.

[51] The Applicant submits that the alleged deficiencies of the affidavits are premised on a misunderstanding of the functions of a Commissioner of Oaths and Notary Public. Neither are responsible for the contents of an affidavit; the responsibility falls on the affiant. Consequently, the stamps on the affidavits are of no relevance to admissibility. Additionally, this Court has found that to strike out affidavits on the basis of deficiencies attributed to the notary public would be akin to elevating form over substance: *A Paschos K Katsikopoulos SA v Polar (The)*, 2003 FCT 584 at para 10.

[52] The Applicant also points out that both affidavits indicate the statements are being made by the Applicant under oath with the words: "I, Subrahmanyam Pilaka Venkata, of the City of Muscat, in the Sultanate of Oman, MAKE OATH AND SAY". The Applicant argues that if this was not sufficient to satisfy the Respondent that the affidavits were properly sworn, these concerns should have been put to the Applicant in cross-examination. The Respondent did not do so and it would be procedurally unfair to allow a challenge at this point after the proper time has already passed. The failure of a party to exercise its opportunity to cross-examine an individual

on an affidavit is a significant and relevant factor in deciding whether the affidavit in question should be admitted into evidence: *Eli Lilly Canada Inc v Novopharm Inc,* 2006 FC 781 at para 15.

[53] Moreover, the Respondent concedes that it does not dispute much of what is contained in the affidavits as being non-controversial. With this in mind, as well as the lateness of the challenge, the Applicant submits that it would be procedurally unfair to render the affidavits inadmissible.

G. *Respondent's Written Submissions*

[54] The Respondent submits that s 81 of the *FCR* is irrelevant to the admissibility of the affidavits as the challenge is addressed to the ability of the consular official to take oaths for consideration by Canadian courts and whether there was in fact an oath administered to the Applicant. However, the Respondent withdraws the aspect of the argument concerning whether Indian officials are members of Her Majesty's diplomatic or consular services for the purposes of s 52 of the *CEA.*

[55] With regards to whether the affidavits are in fact affidavits, the Respondent submits that the Applicant's submissions do not address the Respondent's concern and fail to establish that the affidavits are admissible. The Applicant has not established that a documented signed before a commissioner is admissible evidence, but instead deflects on the issue of whether the Applicant was in fact sworn by the commissioner. Additionally, the Respondent refutes the Applicant's argument that it would be procedurally unfair for the Court to accept the Respondent's

arguments on the basis that the Respondent did not file an affidavit or cross-examine the Applicant.

[56] The Respondent disagrees that the fact that the Respondent did not adduce affidavits is important because the Respondent is not required to do so; only the Applicant is required to do so: ss 10(2)(d) and 11 of the *FC CIRPR*. It is also not unusual that the Respondent relies only upon the certified tribunal record. Similarly, the fact that the Respondent did not cross-examine the Applicant does not demonstrate the affidavits have been properly sworn or are admissible evidence. The Respondent is not required to take advantage of the procedural right to cross-examine in making a legal argument for consideration. Furthermore, there is no basis in law for the Applicant's suggestion that he must be offered an opportunity to comment on the Respondent's concerns and the admissibility of his affidavits.

[57] The Respondent does not challenge the credibility of the statements in the affidavits; accordingly, the jurisprudence cited by the Applicant has no application. The Respondent also disputes that the authorities state a party cannot challenge the admissibility of evidence on the basis of whether it is sworn evidence unless that party first cross-examines the affiant on the admissibility of the affidavit.

[58] Contrary to the Applicant's submissions, the Respondent does not contend that a commissioner must take responsibility for the contents of the affidavit. Instead, the Respondent submits that the commissioner only sets out the identification of the Applicant and witness of the

signature. The issue is whether the Applicant was sworn and the commissioner does not indicate so.

[59] As for the Applicant's recitation that he made oath and was sworn, the Respondent argues that the inclusion of this sentence is because the forms were prepared by Canadian solicitors and sent overseas for commissioning. The concern is that the commissioner's stamps are not consistent with the text of the affidavit because they only attest that the Applicant signed the documents, whereas the text states that the affidavit is sworn. The Respondent submits that the best evidence of what action the commissioner took is the stamps, not the recitation in the affidavits.

[60] With regards to s 16 of the *FC CIRPR*, the Respondent submits that the rule does not render the affidavits admissible as evidence. The materials are retained and will be considered, including a consideration as to whether the evidence is admissible. Additionally, this aspect of the Applicant's argument, even if accepted, can only succeed with respect to his leave affidavit, not his further affidavit.

[61] Finally, the Respondent questions how it would be contrary to the interests of justice to consider and allow the Respondent's objection to the affidavits and request that the Court consider and weigh admissible evidence, particularly since the affidavits fail to comply with the fundamental requirement that they be the evidence of a witness who swears or affirms on oath to tell the truth.

[62] Alternatively, the Respondent submits that the merits of the objections are warranted. First, in regards to timeliness of the objection, the Respondent argues that it is not unheard of for issues to be raised for the first time in a further memorandum. The Applicant has also received a right of reply via the opportunity to make written submissions on this point. Second, the Respondent did not initially object to the affidavits at the leave stage of these proceedings because counsel did not notice the deficiency at the time. It would be inappropriate for the Applicant, who supplied a deficient document, to complain that the Respondent did not notice the deficiency soon enough and obtain the admission of the deficient affidavit on this basis.

[63] Accordingly, the Respondent submits that the affidavits are not entitled to weight due to the deficiency on the face of the documents that suggests they were not sworn.

I. ANALYSIS

A. *Procedural Fairness*

[64] The Applicant says that the Visa Officer breached procedural fairness by rendering a decision without first responding to the Applicant's request for an extension of time to submit additional evidence in support of his application.

[65] The Respondent says that the Applicant is merely seeking to opportunistically take advantage of the situation, and is attempting to exploit the fact that Borders sent the request for an extension of time on the same day as he indicated that Borders [the Applicant's former representative] would not be acting for him:

> 27. The simple answer to the Applicant's claim that "his" extension of time request was not addressed by the visa post, is that neither he nor any authorized representative made any such request. The record indicates that his former representatives – Borders Law Firm – sent an email request on July 7, 2016 to the visa post. But there is evidence that this was unauthorized by the Applicant, because the extension request letter was sent after the Applicant had sent a 'notice of change of representative' to the visa post, which removed Borders Law Firm as his representative and established the Applicant as his own representative. Indeed, from then on, the Applicant corresponded with the post directly. The visa post informed the former representative in an email that it was no longer an authorized representative.

[66] There is much argument between the parties as to whether Borders continued to represent the Applicant when the request for an extension of time was made on July 7, 2017.

[67] However, the record suggests to me that the Visa Officer did not engage in the kind of formal examination of the issue that the parties have placed before me.

[68] After receiving the Applicant's request for a change of mailing address, the Visa Officer went about ensuring that the formalities for changing a representative were complied with and asked the Applicant to submit a signed Use of Representative From, which he duly did. That form made the cancellation of Borders retroactive to July 7, 2016, which was the same day that the request for an extension of time was received.

[69] This left the Visa Officer with a quandary to resolve: had the Applicant, by removing his representative, also cancelled the request for an extension of time?

[70] The easiest way to resolve this quandary would have been to ask the Applicant whether he was still requesting an extension of time. But the Visa Officer didn't do this. The Visa Officer made the following entry:

> On 7 July 2016 received e-mail request for the extension of time to provide additional documents, however some documents have already been received. E-mail sent to PM for review.

[71] This suggests to me that the Visa Officer had concerns about whether the request for an extension of time was still needed, given the fact that "some documents" had already been received by e-mail. He was concerned enough about it that he sought direction from his program manager. We don't know what the program manager said, or what analysis took place, but it is obvious that the decision was to ignore the request for an extension of time because the application was refused without allowing the Applicant more time to submit documents, or without informing him that the request for an extension of time had been refused.

[72] So it looks as though the Visa Officer, with direction from his program manager, decided that the request for an extension of time should be simply ignored. But we don't know why. It could be, for instance, that the Visa Officer took the formal position now taken by the Respondent that the request for an extension of time was no longer valid because the representative who made it had ceased to act for the Applicant at the time the request was made. This seems unlikely to me because it means the application was refused relying upon a highly questionable formal analysis of the continuing validity of the request for an extension of time and, if it was ignored for this reason, reasons were required. This approach would also reflect very badly on the Visa Officer because it would mean that he chose form over substance and didn't tell the Applicant he was denying the request for an extension of time. Any reasonable

person in these circumstances would simply have asked whether the request for an extension of time was still extant.

[73] What seems more likely to me is that the Visa Officer concluded that an extension of time was no longer required because "some document have already been received." Once again, however, this seems to be a very questionable approach by the Visa Officer when a simple e-mail ("Are you still requesting an extension of time?") would have quickly resolved the whole issue in a fair and reasonable way and would have saved both sides the trouble and expense of litigating this issue.

[74] The Respondent says the Applicant is being opportunistic, but the best evidence I have is from the Applicant himself that Borders remained his authorized representative at the material time. The Respondent has chosen not to cross-examine the Applicant on this point. The Respondent has also chosen not to provide evidence from the Visa Officer concerned as to why he decided to ignore the request for an extension of time to submit further information, and has chosen a legalistic approach:

> The Respondent submits that the court's consideration of whether Borders was authorized or not must be decided legally, and principally, and cannot rest on the Applicant's argument, which is merely advanced because the result would benefit him. Looking at the issues objectively, the post was right to ignore the request from Borders, and was right to treat Borders as unauthorized and therefore ignore the request.

[75] I don't think that this approach is appropriate. All we know is that the Visa Officer ignored the request for an extension of time, but we are left to speculate as to why he did so. Without a justifiable reason for ignoring the request, I think we have to conclude that a breach of

procedural fairness has occurred in this case. The Visa Officer ignored the request for an extension of time without notifying the Applicant and then rendered a decision. There is no indication that he did this for the reasons put forward by the Respondent in this application. He might have made the mistake of assuming that the Applicant had already submitted the documentation he wanted to submit: “some documents have already been received.”

[76] Either way, it seems to me that the Applicant’s request for an extension of time was ignored for no justifiable reason.

[77] To use the words of Justice Hughes in *Hussain*, “It was in the circumstances, unreasonable and a denial of procedural fairness and natural justice, for the [the Visa Officer] to make a decision and to send it out before the expiry of [the extension requested]” (paras 6-11).

[78] The Decision needs to be retuned on this issue alone, but it might help if I also address the disagreement between the parties on the points issue.

B. *Assessment of Points*

[79] The Applicant says that he should have been awarded 15 (rather than 13) points under the experience factor because, by the time the Visa Officer rendered the decision on July 15, 2016, the Applicant had over six years of experience which entitled him to 15 points.

[80] The Respondent resists this argument on the following grounds:

> 31. There is no basis in the law for the Applicant's claim that the officer ought to have assessed the Applicant's work experience for the "Experience" factor as of the date the officer decided the Applicant's case, rather than the date the application was made. As with his argument on the extension of time, the Applicant risibly seeks to have it both ways. On the one hand, he was seeking additional points for 'age' from the visa post, arguing that his age should be assessed a few days before his application was made; the corollary of this being that his still greater age at the time of the officer's decision should not count against him. And on the other hand, he argues in this court that the lock-in date should be ignored and seeks assessment of his 'experience' nearly two years after his lock in date, so as to obtain more points for experience.
>
> 32. The Applicant's interest in obtaining the greatest number of points is understandable but his arguments are results-based and accordingly devoid of legal principle and are not articulations of any arguable issue of law. The law is clear: assessments of points under the skilled worker class are determined based on the date the application is made, which date is colloquially termed the "lock-in date".

[81] In the Respondent's Further Memorandum of Argument, this position is modified somewhat:

> 18. With respect to the Applicant's submissions in his further memorandum on the issue of additional points for experience - which are a refinement to the submissions made in his leave record - the Respondent reiterates its position that the Applicant's application was properly refused. The Regulations permit the award of points for experience earned only up to the date of application. This cannot be evaded by the Applicant.
>
> 19. On the point of the bulletins of the Respondent's department, these are context-less snippets that do not serve to demonstrate any error of law in the assessment of the Applicant's application. However, the Respondent concedes that the department may consider whether a worker class applicant has obtained additional experience in the period since application, such that, for instance, if a candidate fails on points assessed as of the date of application but, given additional work experience obtained since, would pass. This assessment 'may' be made provided the candidate met the minimum requirements of s. 75(2) as of the date of application. This assessment is not a right under the Regulations

> but is a practice of the Respondent's department in recognition of the practical realities of cases and fairness.
>
> 20. And in the context of the instant case, the record reflects that the officer was considering this assessment, in addition to the more general plea for substituted evaluation, and concluded that there was insufficient evidence to support the Applicant's claims that he had obtained more work experience. Thus, the issue is one of assessment of evidence. The officer was entitled to find the material relied upon by the Applicant insufficient. This distinguishes the case from the cases cited by the Applicant.

[82] So the Respondent's position appears to be that there is no right to have additional work experience factored in after the "lock-in date," which is the date of the application, but this can be done as a matter of departmental practice "in recognition of the practical realities of cases and fairness."

[83] It isn't clear to me whether the Respondent is saying that it is permissible to take into account experience after the "lock-in date," and this is done as a matter of practice, or whether the Respondent is saying the department "may" do this but it doesn't have to and it is up to the individual officer. In any event, it is clear that the Respondent takes the position that the Visa Officer in the present case considered additional experience "in addition to the more general plea for substituted evaluation, and concluded that was sufficient evidence to support the Applicant's claims that he had obtained more work experience."

[84] So, on the facts of this case, I take it that the Respondent is saying that the Applicant's post "lock-in date" experience was examined by the Visa Officer, but that there was "insufficient evidence to support the Applicant's claims that he had obtained more work experience."

[85] At the hearing before me, however, Respondent's counsel was adamant that s 80(1) of the *Regulations* only permitted points to be awarded for full-time work experience within the 10 years before the date on which the application is made, so that the Visa Officer was precluded as a matter of law, from considering work experienced after the "lock-in date."

[86] This harder position does not seem to have been reflected by the practice of the department concerned. In the Respondent's own Overseas Processing Manual, Chapter 6a – Federal Skilled Workers [OP 6], section 10.13 of the 2009 version said that officers "must … take into account any years of experience that occur between application and assessment and for which the applicant had submitted the necessary documentation (R77)."

[87] The version of OP 6 in force when the Applicant made his original application in 2014 did not contain these words, but there were no material changes to the governing legislation and no directions that officers should not take into account work between the application and the assessment.

[88] With regards to the present reconsideration Decision, the record shows that the Applicant clearly asked that the additional experience after December 2014 be taken into account and he provided the relevant employment records. This meant that at the time of assessment the Applicant had accumulated an additional 1.5 years of experience, and if this additional experience is taken into account, this means he should have been awarded 15 points for 6 years of experience.

[89] The Respondent now says two different things. First of all, s 80(1) of the *Regulations* does not permit this to happen. However, this is clearly contradicted by the practice of the department and the mandatory language of the 2009 version of OP 6. There is also some case law, though not necessarily emanating from facts similar to the present case, to suggest that "lock-in date" doesn't mean that subsequent experience cannot be considered:

> 25. Addressing what time period may be considered for the purposes of evaluating work experience, this Honourable Court held in Belousyuk:
>
> > **This expression "lock-in date" is not found in the Act or in the regulations issued thereunder. It was only described in the former Immigration Manual - Overseas Processing, Chapter OPl. I understand that when an application was locked in, it meant that the law that was in effect on that date would apply when the application was ultimately decided thus, for example, a decrease in occupational demand points would not affect the application of a skilled worker filed before the date of such increase.**
> >
> > **However, this did not mean that the visa officer was not entitled to consider the facts which occurred after the lock-in date. In fact, it has been held by this Court that the visa officer must evaluate the application for permanent residence on the basis of the facts as they stand at the time of the exercise of that discretion and that this approach could also work to an applicant's advantage where he or she manages to upgrade skills or secure a viable job offer.**
> >
> > **Belousyuk v. Canada (M.C.I.), 2004 FC 746, pars. 17-19 [emphasis added]**
> >
> > **Shabashkevich v. Canada (M.C.I.), 2003 FCT 361 (CanLII), [2003] F.C.J. No. 510 (QL) (T.D.))**
> >
> > **Lau v. Canada (M.C.I.), 1999 CanLII 7388 (FC), 162 F.T.R. 134 (F.C.T.D.)**
>
> [emphasis in original]

[90] It seems to me, then, that the law is not entirely clear on this issue, but that there is a practice (as set out in OP 6), and as conceded by the Respondent, that "the department may consider whether a worker class applicant has obtained additional experience in the period since application, such that, for instance, if a candidate fails on points assessed as of the date of application but, gives additional work experience obtained since, would pass." Also, I take it that the Respondent feels this was done in this case, but the evidence was insufficient.

[91] If this practice exists then it must be afforded to all applicants on procedural fairness grounds. I see no real indication in the Decision that it was afforded to the Applicant in this case. And if it was, there is no clear explanation as to why new evidence of additional experience should not have been considered sufficient. It should be considered when this matter is returned for reconsideration.

C. *Certification*

[92] Counsel 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 Visa Officer.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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