

Federal Court



Cour fédérale

Date: 20130220

Docket: IMM-5816-12

Citation: 2013 FC 175

Montreal, Quebec, February 20, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

SHERIF MOHAMED RASHED

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant seeks judicial review of a refusal to reconsider his application for permanent residence [PR Application] as a federal skilled worker. The Applicant takes the position that the March 20, 2012 refusal of an immigration officer [first Officer] to process his PR Application [underlying decision] was unreasonable and in breach of the duty of procedural fairness. The Applicant argues that another immigration officer [second Officer] erred in refusing to reconsider a decision that was both, in his view, unreasonable and in violation of the rules of natural justice.

II. Judicial Procedure

[2] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for judicial review of the decision of the second Officer, dated May 23, 2012.

III. Background

[3] The Applicant, a citizen of Egypt, was born in 1966.

[4] In June 1991, the Applicant received a medical degree from Cairo University. He completed his residency training at Cairo University Hospitals in August 1992.

[5] Since July 1998, the Applicant has been employed with Eli Lilly & Company [Eli Lilly], a well-known global pharmaceutical company, as Manager in Health Care (May 2008 to present); Sales, Marketing and Advertising Manager (November 2008 to May 2009); Manager in Health Care – Area Brand Leader (May 2006 to April 2008); Manager in Health Care – Senior Brand Manager (May 2001 to April 2006); and Manager in Health Care – District Manager (July 1998 to April 2001).

[6] In Schedule 3 of the PR Application, the Applicant identified his main employment duties for each of his positions. A letter of employment from Eli Lilly, dated July 21, 2010 [Employment Letter], also sets out his employment history and duties.

[7] In Schedule 3 of his PR Application, the Applicant identified his duties as Manager of Health Care: (i) planning, organizing, directly controlling, and evaluating the delivery of health care services; (ii) planning and controlling departmental budgets; (iii) developing and implementing plans for new programs; (iv) assisting decision-making of affiliates; and, (v) following-up on the implementation of programs and projects with health-care providers and the medical community.

[8] The Employment Letter also identifies the Applicant's duties as Manager in Health Care: (i) leading improvement in different processes within departments at the organization; (ii) improving productivity and speed of processes with different business implications; (iii) deploying the Six Sigma program to achieve organization and area-wide priorities and objectives; (iv) assisting affiliates in making sound decisions as a member of the senior management board; and, (v) leading transformation of the organization to achieve business objectives.

[9] In Schedule 3 of his PR Application, the Applicant identified his duties as Sales, Marketing and Advertising Manager: (i) advertising and planning marketing activities; (ii) developing market strategy; and, (iii) supervising and coaching brand managers.

[10] The Employment Letter also identifies the Applicant's duties as Sales, Marketing and Advertising Manager: (i) supervising and coaching brand managers; (ii) developing brand managers training curriculum; (iii) coaching brand managers in marketing strategy development, tactics, and program design and implementation; and, (iv) following up on the implementation of programs and projects with health care providers and the medical community.

[11] In Schedule 3 of his PR Application, the Applicant identified his duties as Manager in Health Care – Area Brand Leader: (i) monitoring performance of affiliates and helping management fix issues; (ii) developing communication strategy with medical community; and, (iii) planning, organizing, directly controlling, and evaluating the delivery of health care services.

[12] The Employment Letter also identifies the Applicant's duties as Manager in Health Care – Area Brand Leader: (i) coordinating activities and brand strategy across various affiliates; (ii) developing communication strategy with the medical community and patients; and (iii) planning and administering projects across various affiliates to provide patient services.

[13] In Schedule 3 of his PR Application, the Applicant identified his duties as Manager in Health Care – Senior Brand Manager: (i) developing and implementing new programs, special projects, new material, and equipment acquisitions; (ii) assessing communication vehicles and activities; (iii) developing tactics and an action plan for communications with medical and health care community; and, (iv) developing strategy for communication with medical community and patients.

[14] The Employment Letter also identifies the Applicant's duties as Manager of Health Care – Senior Brand Manager: (i) developing and implementing plans for new programs, special projects, new material, and equipment acquisitions; (ii) managing staffing levels; and, (iii) developing strategy, information plans, and different communication vehicles with the medical community and patients.

[15] In Schedule 3 of his PR Application, the Applicant identified his duties as Manager in Health Care – District Manager: (i) coordinating and developing tactics for medical representatives with medical health community; and, (ii) formulating policies and programs in accordance with the applicable laws and regulations.

[16] The Employment Letter also identifies the Applicant's duties as Manager in Health Care – District Manager: (i) supervising and managing the business of a regional operation; (ii) developing tactics and an action plan for communication with the medical health care community; and, (iii) ensuring that medical information and disease and therapy areas is conveyed to the health care community in accordance with the applicable laws and regulations of the company and its code of ethical interaction with health care professionals.

[17] In an affidavit filed before this Court, the Applicant alleges that his employment duties consist of planning, organization, control, evaluation, and delivering health care services including diagnosis and treatment.

[18] On September 26, 2009, the Applicant submitted his PR Application on the basis that he was a federal skilled worker under National Occupation Classification 0311 – Managers in Health Care [NOC 0311 class].

[19] On March 30, 2012, the first Officer issued the underlying decision, finding the PR Application ineligible for processing because the Applicant did not establish that he performed the actions described in the lead statement set out in the occupational description for the NOC 0311

class [NOC 0311 Lead Statement], or performed all of the essential duties and a substantial number of the main duties set out in the occupational description for the NOC 0311 class [NOC 0311 Occupational Description].

[20] On April 27, 2012, the Applicant requested a reconsideration of the underlying decision on the basis that he had established that he was within the NOC 0311 class.

[21] On May 23, 2012, the second Officer denied the request for reconsideration.

IV. Decision under Review

[22] The first Officer determined that the PR Application was ineligible for processing under the federal skilled worker category pursuant to subsection 12(2) of the *IRPA* and subsection 75(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. The first Officer took the position that the Applicant did not meet the criteria specified in the Ministerial Instructions [MI-1] established under subsection 87.3(3) of the *IRPA* and published in the Canada Gazette, Part I on November 29, 2008.

[23] The first Officer reasoned that MI-1 provides that applications under the federal skilled worker category are only eligible for processing if the applicant (i) has an arranged employment offer [AEO]; (ii) is legally residing in Canada and has been in Canada for one year as a Temporary Foreign Worker or International Student; or (iii) has at least one year of continuous full-time or equivalence paid work experience in the last ten years in a listed occupation class.

[24] The first Officer accepted that the NOC 0311 class is a listed occupation class under MI-1 but found that the Applicant did not establish that he performed the actions described in the NOC 0311 Lead Statement, or all of the essential duties and a substantial number of the main duties in the NOC 0311 Occupational Description.

[25] The first Officer found that a description of the duties provided by the Applicant in Schedule 3 of his PR Application and by the Employment Letter did not correspond to the actions described in the NOC 0311 Lead Statement or the essential duties and main duties in the NOC 0311 Occupational Description. The first Officer further reasoned that, within the meaning of the NOC 0311 Lead Statement and NOC 0311 Occupational Description, the NOC 0311 class refers to health care managers who work in institutions that provide health care services such as hospitals, medical clinics, nursing homes, and other health care establishments. The first Officer took the position that, since the Applicant's employer was a pharmaceutical company, it did not provide health care services within the meaning of the NOC 0311 Lead Statement and NOC 0311 Occupational Description. Consequently, the first Officer was not persuaded that the Applicant participated in the delivery of health care. Rather, the descriptions of his duties better corresponded to those of the NOC 0611 – Sales/Marketing Manager occupation class [NOC 0611 class].

[26] The first Officer also found that the Applicant was ineligible to have his PR Application processed under the NOC 0611 class, which was not a listed occupation under MI-1.

[27] The second Officer refused to reconsider the underlying decision after reviewing the Applicant's file and finding that the underlying decision was concluded properly. The Officer noted

that the decision-maker in the underlying decision found that the Applicant had not established work experience in the NOC 0311 class.

[28] The second Officer also noted that the Citizenship and Immigration Canada website and other materials stated that the decisions on the eligibility of permanent residence applications are based only on the documentation submitted by applicants. The second Officer further stated that applicants are not convoked to interview and that further clarification or additional documents are not requested. According to the second Officer, applicants have always been required to provide information on the employment duties to support the eligibility of their applications for permanent residence.

[29] The second Officer's notes from the Computer Assisted Immigration Processing System [CAIPS Notes] state: "Request for reconsideration received from rep via email 27MAR2012. No information provided that would warrant reopening the file. Confirmation of refusal sent this day via email" (Application Record at p 71).

V. Issues

- [30] (1) Does the first Officer's refusal to reconsider the underlying decision constitute a decision?
- (2) Did the first Officer err in refusing to reopen the PR Application because the underlying decision was unreasonable or in breach of procedural fairness?

VI. Relevant Legislative Provisions

[31] Reference is made to Annex “A” for the relevant legislative provisions of the *IRPA*.

[32] Reference is also made to Annex “B” for the relevant provisions of Ministerial Instructions MI-1.

[33] In addition, the Court refers to Annex “C” for the relevant sections of the NOC 0311 Lead Statement and the NOC 0311 Occupational Description.

VII. Position of the Parties

[34] The Applicant submits that denying his request for reconsideration is a decision because it amounts to a fresh exercise of discretion. In the Applicant’s view, the second Officer erred in exercising this discretion because the underlying decision was unreasonable and the underlying decision breached principles of procedural fairness. The Applicant submits that there is no requirement to provide new materials in every request for reconsideration of a permanent residence application and that a decision-maker may reopen a file if it is in the interest of justice in unusual circumstances.

[35] As for the unreasonability of the underlying decision, the Applicant submits that it was unreasonable to find that he did not perform the actions in the NOC 0311 Lead Statement.

According to the Applicant, the difference between the March 19, 2010 Assessment (which found him eligible to have his PR Application processed) and the final determination on March 30, 2012 (which found him ineligible) was not adequately explained in the first Officer’s reasons. The

Applicant argues that inadequate reasons do not meet the transparency and intelligibility criteria in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. The Applicant also argues that the objectives of the *IRPA* (set out in subsection 3(1)) militate in his favor.

[36] The Applicant further submits that it was unreasonable to find that he did not perform all of the essential duties and a substantial number of the main duties in the NOC 0311 Occupational Description. The Applicant complains that a list of essential duties does not appear in the NOC 0311 Occupational Description and contends that duties described in Schedule 3 of his PR Application and in the Employment Letter correspond to the main duties listed in the NOC 0311 Occupational Description. The Applicant adds that his employer (as a global researcher, developer, and supplier of pharmaceutical products) is intimately tied to administering the provision of laboratory medicine, that his medical training places him in the NOC 0311 class, and that a positive inference should be drawn from the fact that his description of his duties in Schedule 3 corresponds to the language of the NOC 0311 Occupational Description without simply reiterating it. Finally, the Applicant argues that, since they do not explain why the Officer found that he did not perform all of the essential and a substantial number of the main duties in the NOC 0311 Occupational Description, the reasons are inadequate and unreasonable.

[37] The Applicant also submits that the first Officer took an unreasonably narrow approach to the scope of the terms “delivery of health care” and “health care establishments” in the NOC 0311 Lead Statement. In the Applicant’s view, his employer’s pharmaceutical activities are inextricable from delivering health care in contemporary Canada. The Applicant argues that the first Officer’s

construction of these terms is based on personal knowledge and assumptions about Eli Lilly rather than the evidence submitted.

[38] The Applicant submits that procedural fairness required the first Officer to request further submissions because the fundamental issue in the decision was the scope and meaning of the NOC 0311 Lead Statement and the NOC 0311 Occupational Description. Principles of natural justice, according to the Applicant, required the first Officer to allow the Applicant to make submissions clarifying his work at Eli Lilly. The Applicant supports this argument by reference to Immigration Manual OP 1, Overseas Processing: Procedures, which, according to the Applicant, states that applicants must have an opportunity to disabuse officers of any concerns and be allowed to bring evidence and to make an argument.

[39] The Respondent admits that denying the request for reconsideration constitutes a decision but takes the position that the second Officer did not err because the underlying decision was reasonable and did not breach principles of procedural fairness.

[40] According to the Respondent, there is neither a general duty in administrative law to reconsider an application for permanent residence nor one to provide detailed reasons for a refusal to reconsider an application. The Respondent submits the following test for refusing to reconsider a permanent residence application: (i) Was the decision-maker unreasonable to decide not to reopen the application on the receipt of significant additional information?; and, (ii) Was the decision-maker unreasonable in failing to provide more detailed reasons for refusing the request for reconsideration? The Respondent argues that, since MI-1 requires applicants for permanent

residence to provide a complete file, it is not unreasonable for a system of application review to be designed to incentive applicants to exercise reasonable care in preparing and submitting their applications. The Respondent further argues that the refusal to reconsider is not unreasonable because the Applicant, in requesting reconsideration, did not file additional evidence or request a delay to file such evidence.

[41] On the underlying decision, the Respondent counters that the main duties outlined in the NOC 0311 Lead Statement and the NOC 0311 Occupational Description do not correspond to the Applicant's employment duties, as identified in Schedule 3 of his PR Application and the Employment letter. The Respondent submits that the duties specified in the latter are not similar to those identified in the former, which are of a medical nature. According to the Respondent, the question before the first Officer was whether the Applicant performed the main duties of a NOC 0311 class position – not his academic qualifications or job title. The Respondent also takes the position that the first Officer's reasons do not lack transparency and intelligibility.

[42] In the Respondent's view, the Applicant did not establish that he was employed by a health care establishment. The Respondent argues that the first Officer came to this conclusion not on the basis of his or her personal knowledge or assumptions with regard to the occupation but rather on the Applicant's insufficient evidence. The Respondent further submits that this Court cannot consider the Applicant's explanations in his affidavit since this information was not before the first Officer.

[43] The Respondent's position is that the first Officer had no obligation to seek further submissions from the Applicant where the evidence filed is insufficient or does not meet the requirements of the legislation. The Respondent supports this argument by reference to OP 6A – Federal Skilled Workers – Applications received on or after February 27, 2008 and before June 26, 2010, which provides that: “The visa office assesses the applicant's submissions as is ... No follow up request for missing documents related to selection is required ... If the applicant's submission is insufficient to determine that the application *is* eligible for processing, a negative determination of eligibility should be rendered” (Respondent's Record at Annex D at p 69).

VIII. Analysis

Standard of Review

[44] Whether denying the Applicant's request for reconsideration constitutes a decision is a question of law determinable on the standard of correctness (*Dong v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1108). Responding to a request for reconsideration of an application for permanent residence involves an exercise of discretion that is reviewable on a standard of reasonableness (*Trivedi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 422).

[45] As for the underlying decision, the parties agree that decisions on eligibility for permanent residence as a member of the federal skilled worker class are exercises of discretion that attract the standard of reasonableness (*Ismaili v Canada (Minister of Citizenship and Immigration)*, 2012 FC 351) and questions of procedural fairness are reviewable on the standard of correctness (*Talpur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 25).

[46] Where the standard of reasonableness applies, the Court may only intervene if the Officer's reasoning is not "justified, transparent or intelligible". To meet this standard, the decision must also fall in the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47).

[47] In challenging the underlying decision, the Applicant submits that the first Officer's reasons are inadequate. According to the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, however, if reasons are given, a challenge to the reasoning or result is addressed in the reasonableness analysis. *Newfoundland Nurses* directs that "reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (at para 14). A reviewing court may not "substitute [its] own reasons" but may "look to the record for the purpose of assessing the reasonableness of the outcome" (at para 15).

(1) Does the first Officer's refusal to reconsider the underlying decision constitute a decision?

[48] Both parties agree that the second Officer's refusal to reconsider the PR Application constitutes a decision and this Court agrees. In an email refusing the Applicant's request for reconsideration, the second Officer stated: "I have reviewed your file and I am satisfied that the case was concluded properly" (at p 6). In *Dong*, above, Justice Paul Crampton, as he then was, held that a decision subject to judicial review by this Court must amount to a "fresh exercise of discretion" (at para 19). A fresh exercise of discretion can be inferred from the second Officer's review of the PR Application and satisfaction that the underlying decision was concluded properly.

(2) Did the first Officer err in refusing to reopen the PR Application because the underlying decision was unreasonable or in breach of procedural fairness?

[49] In *Trivedi*, above, Justice Crampton held that “[t]here is no general duty to reconsider an application for permanent residence upon the receipt of new information and there is no general duty to provide detailed reasons for deciding not to do so” (at para 30). Nevertheless, the Federal Court of Appeal in *Kurukkal v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 230, has held that “the principle of *functus officio* does not strictly apply in non-adjudicative administrative proceedings and that, in appropriate circumstances, discretion does exist to enable an administrative decision-maker to reconsider his or her decision” (at para 3). According to *Kurukkal*, a decision-maker’s “obligation, at [the request for reconsideration] stage, is to consider, taking into account all relevant circumstances, whether to exercise the discretion to reconsider” (at para 5).

[50] In the present case, it was reasonable to deny the Applicant’s request for reconsideration because the underlying decision was reasonable and there was no breach of procedural fairness. Since this is dispositive of the Application, it is not necessary to consider the Applicant’s submissions that new evidence is not necessary in requesting reconsideration.

[51] As for the underlying decision, it was reasonable to find that the Applicant did not establish that he performed the actions described in the NOC 0311 Lead Statement, or all of the essential tasks and a substantial number of the main duties in the NOC 0311 Occupational Description. The decision to refuse to process the PR Application was sustainable on this ground.

[52] Under subsection 87.3(2) of the *IRPA*, the processing of permanent residence applications must be conducted in a manner that, in the opinion of the Minister, will best support the attainment

of the immigration goals established by the federal government. Paragraph 87.3(3)(d) of the *IPRA* permits the Minister to give instructions on processing applications, including instructions providing for their disposition. Such instructions, under subsection 87.3(6) of the *IRPA*, must be published in the *Canada Gazette*.

[53] Pursuant to 87.3(6) of the *IRPA*, MI-1 was published in the *Canada Gazette*, Part I on November 28, 2008 and came into force on its date of publication.

[54] According to MI-1, federal skilled worker applications shall be placed into processing immediately upon receipt if they: (i) are submitted with an AEO; (ii) are submitted by foreign nationals residing legally in Canada for at least one year as Temporary Foreign Workers or International Students, or, (iii) are submitted by skilled workers with at least one year of continuous full-time or equivalent paid work experience in the last ten (10) years under a listed National Occupation Classification category [NOC category]. The NOC 0311 class is a listed NOC category under MI-1.

[55] The NOC 0311 Lead Statement states that the NOC 0311 class includes managers who plan, organize, direct, control, and evaluate the delivery of health care services, such as diagnosis and treatment, nursing and therapy, within institutions that provide health care services. The NOC 0311 Lead Statement states that managers in health care are persons employed in hospitals, medical clinics, nursing homes and other health care establishments. This contradicts the Applicant's assertion that the NOC 0311 Lead Statement "does not require that [an applicant] be employed by [a health care] establishment" (Affidavit of the Applicant at para 34).

[56] The NOC 0331 Occupational Description does not list any essential tasks but does outline the following main duties, some or all of which managers in health care perform: (i) planning, organizing, directing, controlling, and evaluating the delivery of health care services within a department or establishment; (ii) consulting with boards of directors and senior managers to maintain and establish standards for the provision of health care services; (iii) developing evaluation systems to monitor the quality of health care given to patients; (iv) monitoring the use of diagnostic services, in-patient beds and facilities to ensure effective use of resources; (v) developing and implementing plans for new programs, special projects, new material and equipment acquisitions and future staffing levels in their department or establishment; (vi) planning and controlling a departmental or establishment budget; (vii) representing the department or establishment at meetings with government officials, the public, the media, and other organizations; (viii) supervising health care supervisors and professionals; and, (ix) recruiting health care staff of the department or establishment.

[57] The NOC 0311 Occupational Description also states that managers in health specialize in administering the provision of specific health care services such as dietetics, clinical medicine, laboratory medicine, nursing, physiotherapy or surgery.

[58] The Applicant's employment duties (according to Schedule 3 of his PR Application and the Employment Letter) resemble some of the main duties listed in the NOC 0311 Occupational Description. The Applicant's evidence suggests that he (i) planned, organized, and directly controlled the delivery of some sort of health care service at Eli Lilly; (ii) developed and implemented plans for new programs, special projects, new material and equipment acquisitions and

future staffing levels at Eli Lilly; (iii) planned and controlled a budget and, (iv) represented Eli Lilly at meetings with medical community organizations.

[59] In finding that the Applicant did not satisfy MI-1, the first Officer essentially inferred the character of his employment duties from the place of his employment, Eli Lilly. Contrary to the Applicant's submissions, it was open to the first Officer to draw inferences from a matter of common knowledge – that Eli Lilly is a global researcher, developer, and supplier of pharmaceutical products. In *Canepa v Canada (Minister of Employment and Immigration)*, [1992] 3 FC 270, the Federal Court of Appeal held that an administrative decision-maker may draw inferences from matters that do not go beyond common knowledge without giving notice (at para 27). In *Obot v Canada (Minister of Citizenship and Immigration)*, 2012 FC 208, Justice Richard Mosley also addressed extension of the concept of judicial notice to administrative decision-makers, finding that it “would only arise where the facts are beyond dispute” (at para 24). There might have been dispute as to the inferences that the first Officer drew from the fact that Eli Lilly is a pharmaceutical company but whether Eli Lilly is a pharmaceutical company is itself a fact beyond reasonable dispute.

[60] *Ismaili*, above, a decision by Justice Marie-Josée Bédard cited by the Applicant, is distinguishable on this point. *Ismaili* stands for the proposition that applicants cannot expect decision-makers to substitute gaps in their evidence with the decision-maker's own personal knowledge and assumptions (at para 23). *Ismaili* does not prevent the Officer from drawing inferences from matters of common knowledge.

[61] It would be reasonable to find that the scope of the terms “delivery of health care services” and “health care establishments”, as used in the NOC 0311 Lead Statement and NOC 0311 Occupational Description, did not include the Applicant’s activities.

[62] It would not be unreasonable to conclude that planning, organizing, directing, controlling, and evaluating the “delivery of health care services” occurs in a context where there is some sort of direct patient contact. The NOC 0311 Lead Statement identifies some of the activities constituting a “delivery of health care services”: (i) diagnosis; (ii) treatment; (iii) nursing; and, (iv) therapy. The common thread of these activities is administering some kind of direct interaction with patients. The main duties in the NOC 0311 Occupational Description confirm this analysis. The common thread of these main duties is administering an environment where there is direct interaction between a provider of health care services and a patient.

[63] It would also be reasonable to infer the meaning of “other health care establishments” in the NOC 0311 Occupational Description from the terms preceding it. In *National Bank of Greece (Canada) v Katsikonouris*, [1990] 2 SCR 1029, the Supreme Court of Canada stated that “[w]hatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it” (at para 12). The scope of the general term “health care establishments” is narrowed by those establishments preceding it in the NOC 0311 Lead Statement (hospitals, medical clinics, nursing homes). These are settings where there is direct interaction with patients in delivering health care. It would be reasonable to find that a “health care

establishment” described in the NOC 0311 Lead Statement is a setting where health care services are directly provided to a patient.

[64] The Applicant did not present evidence that he worked in a health care establishment or delivered health care services within the meaning of the NOC 0311 Lead Statement or Occupational Description. Nothing on the record shows that he was administering a setting in which health care services were being directly provided to patients. Indeed, many of the Applicant’s employment duties suggest that he was supervising interaction with members of the medical community rather than with patients. Only one of the Applicant’s employment duties seems to have involved any direct interaction with patients. As Manager in Health Care – Area Brand Leader and Manager in Health Care – Senior Brand Manager, the Applicant developed communication strategies for the medical community and patients. Even this weak evidence does not lead to the conclusion that he worked in a health care establishment or administered the provision of health care services because the precise nature of these ambiguous communications is unspecified in the evidence.

[65] It falls, moreover, within the realm of possible and acceptable outcomes to infer that the Applicant did not perform the actions and duties outlined in the NOC 0311 Lead Statement and the NOC 0311 Occupational Description from the fact of his employment at Eli Lilly, a commonly-known pharmaceutical company. There was no evidence before the first Officer to undermine this inference. An applicant under the foreign skilled worker class has the burden of presenting evidence of their previous employment duties; this required the Applicant to supply sufficient documentation and to “put his best case forward” (*Ismaili*, above, at para 18).

[66] This Court does not necessarily find that an employee of a pharmaceutical company can never work for a health care establishment or administer the provision of health care services for the purposes of the NOC 0311 Lead Statement or the NOC 0311 Occupational Description. It finds that, given the evidence presented, the first Officer was reasonable to find that the Applicant had not established that he performed the actions described in the NOC 0311 Lead Statement because he did not establish that his employment was within the scope of the terms “delivery of health care services” and “health care establishments”. Since the main duties described in the NOC 0311 Occupational Description all involve either administering the delivery of health care services or health care establishments, it follows that it would also be reasonable to find that the Applicant had not performed a substantial number of these main duties.

[67] The Applicant’s education was a neutral factor in determining if he satisfied MI-1 because the NOC 0311 Lead Statement and NOC 0311 Occupational Description focus on an applicant’s employment duties rather than academic training (*Tabañag v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1293 at para 22).

[68] The underlying decision is also sustainable on the ground of procedural fairness. It is a well-established principle of this Court 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” (*Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283, [2007] 3 FCR 501 at para 24).

IX. Conclusion

[69] The undersigned member of this Court also wishes to thank the Applicant and Respondent for the very high quality of their written submissions in this Application.

[70] For all of the above reasons, the Applicant's application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that that the Applicant's application for judicial review be dismissed. No question of general importance for certification.

"Michel M.J. Shore"

Judge

ANNEX “A”

The following are the relevant legislative provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27:

87.3 (1) This section applies to applications for visas or other documents made under subsection 11(1), other than those made by persons referred to in subsection 99(2), to sponsorship applications made by persons referred to in subsection 13(1), to applications for permanent resident status under subsection 21(1) or temporary resident status under subsection 22(1) made by foreign nationals in Canada, to applications for work or study permits and to requests under subsection 25(1) made by foreign nationals outside Canada.

(2) The processing of applications and requests is to be conducted in a manner that, in the opinion of the Minister, will best support the attainment of the immigration goals established by the Government of Canada.

(3) For the purposes of subsection (2), the Minister may give instructions with respect to the processing of applications and requests, including instructions

(a) establishing categories of applications or requests

87.3 (1) Le présent article s'applique aux demandes de visa et autres documents visées au paragraphe 11(1) — sauf à celle faite par la personne visée au paragraphe 99(2) —, aux demandes de parrainage faites par une personne visée au paragraphe 13(1), aux demandes de statut de résident permanent visées au paragraphe 21(1) ou de résident temporaire visées au paragraphe 22(1) faites par un étranger se trouvant au Canada, aux demandes de permis de travail ou d'études ainsi qu'aux demandes prévues au paragraphe 25(1) faites par un étranger se trouvant hors du Canada.

(2) Le traitement des demandes se fait de la manière qui, selon le ministre, est la plus susceptible d'aider l'atteinte des objectifs fixés pour l'immigration par le gouvernement fédéral.

(3) Pour l'application du paragraphe (2), le ministre peut donner des instructions sur le traitement des demandes, notamment des instructions :

a) prévoyant les groupes de demandes à l'égard desquels

to which the instructions apply;

s'appliquent les instructions;

(a.1) establishing conditions, by category or otherwise, that must be met before or during the processing of an application or request;

a.1) prévoyant des conditions, notamment par groupe, à remplir en vue du traitement des demandes ou lors de celui-ci;

(b) establishing an order, by category or otherwise, for the processing of applications or requests;

b) prévoyant l'ordre de traitement des demandes, notamment par groupe;

(c) setting the number of applications or requests, by category or otherwise, to be processed in any year; and

c) précisant le nombre de demandes à traiter par an, notamment par groupe;

(d) providing for the disposition of applications and requests, including those made subsequent to the first application or request.

d) régissant la disposition des demandes dont celles faites de nouveau.

(3.1) An instruction may, if it so provides, apply in respect of pending applications or requests that are made before the day on which the instruction takes effect.

(3.1) Les instructions peuvent, lorsqu'elles le prévoient, s'appliquer à l'égard des demandes pendantes faites avant la date où elles prennent effet.

(3.2) For greater certainty, an instruction given under paragraph (3)(c) may provide that the number of applications or requests, by category or otherwise, to be processed in any year be set at zero.

(3.2) Il est entendu que les instructions données en vertu de l'alinéa (3)c) peuvent préciser que le nombre de demandes à traiter par an, notamment par groupe, est de zéro.

(4) Officers and persons authorized to exercise the powers of the Minister under

(4) L'agent — ou la personne habilitée à exercer les pouvoirs du ministre prévus à

section 25 shall comply with any instructions before processing an application or request or when processing one. If an application or request is not processed, it may be retained, returned or otherwise disposed of in accordance with the instructions of the Minister.

(5) The fact that an application or request is retained, returned or otherwise disposed of does not constitute a decision not to issue the visa or other document, or grant the status or exemption, in relation to which the application or request is made.

(6) Instructions shall be published in the Canada Gazette.

(7) Nothing in this section in any way limits the power of the Minister to otherwise determine the most efficient manner in which to administer this Act.

l'article 25 — est tenu de se conformer aux instructions avant et pendant le traitement de la demande; s'il ne procède pas au traitement de la demande, il peut, conformément aux instructions du ministre, la retenir, la retourner ou en disposer.

(5) Le fait de retenir ou de retourner une demande ou d'en disposer ne constitue pas un refus de délivrer les visa ou autres documents, d'octroyer le statut ou de lever tout ou partie des critères et obligations applicables.

(6) Les instructions sont publiées dans la Gazette du Canada.

(7) Le présent article n'a pas pour effet de porter atteinte au pouvoir du ministre de déterminer de toute autre façon la manière la plus efficace d'assurer l'application de la loi.

ANNEX “B”

The following are the relevant provisions of the Ministerial Instructions [MI-I]:

Federal Skilled Worker applications submitted on or after February 27, 2008, meeting the following criteria shall be placed into processing immediately upon receipt:	Les demandes présentées par des travailleurs qualifiés (fédéral) à partir du 27 février 2008 et qui répondent aux critères suivants doivent être traitées en priorité dès leur réception :
- Applications submitted with an offer of Arranged Employment and applications submitted by foreign nationals residing legally in Canada for at least one year as Temporary Foreign Workers or International Students;	- Demandes présentées avec une offre d'emploi réservé et demandes présentées par des étrangers vivant légalement au Canada depuis au moins une année à titre de travailleurs étrangers temporaires ou d'étudiants étrangers;
- Applications from skilled workers with evidence of experience (see footnote 1) under one or more of the following National Occupation Classification (NOC) categories:	- Demandes présentées par des travailleurs qualifiés (fédéral) accompagnées d'une preuve d'expérience (voir référence 1) dans l'une ou plusieurs des catégories suivantes de la Classification nationale des professions (CNP) :
...	[...]
0311 Managers in Health Care	0311 Directeurs/directrices des soins de santé
Footnote 1 At least one year of continuous full-time or equivalent paid work experience in the last ten years.	Référence 1 Au moins une année d'expérience professionnelle continue à temps plein ou l'équivalent rémunéré, au cours des dix dernières années.

ANNEX “C”

The following are the relevant sections of the National Occupation Classification [NOC] 0311 Lead

Statement and NOC 0311 Occupational Description:

This unit group includes managers who plan, organize, direct, control and evaluate the delivery of health care services, such as diagnosis and treatment, nursing and therapy, within institutions, and in other settings, that provide health care services. They are employed in hospitals, medical clinics, nursing homes and other health care organizations.

Les directeurs des soins de santé planifient, organisent, dirigent, contrôlent et évaluent la prestation des services des soins de santé tels que le diagnostic et le traitement et les soins infirmiers et thérapeutiques dans des établissements assurant la prestation des soins de santé et d'autres établissements. Ils travaillent dans des centres hospitaliers, des cliniques médicales, des centres de soins de longue durée et d'autres organismes en soins de santé.

...

[...]

Managers in health care perform some or all of the following duties:

Les directeurs des soins de santé exercent une partie ou l'ensemble des fonctions suivantes :

- Plan, organize, direct, control and evaluate the delivery of health care services within a department of a health care institution, or in other settings where health care services are provided

- planifier, organiser, diriger, contrôler et évaluer la prestation des services des soins de santé au sein d'un service dans un établissement de santé, ou dans d'autres milieux de soins de santé;

- Consult with boards of directors and senior managers to maintain and establish standards for the provision of health care services

- consulter les conseils d'administration et les cadres supérieurs afin de maintenir et de formuler des normes pour la prestation des soins de santé;

- Develop evaluation systems to monitor the quality of health

- élaborer des systèmes d'évaluation afin de surveiller la

care given to patients

qualité des soins de santé
donnés aux patients;

- Monitor the use of diagnostic services, in-patient beds and facilities to ensure effective use of resources

- surveiller l'utilisation des services diagnostiques, des lits pour les patients hospitalisés et des autres installations afin de s'assurer que les ressources sont utilisées avec efficacité et efficience;

- Develop and implement plans for new programs, special projects, new material and equipment acquisitions and future staffing levels in their department or establishment

- préparer et mettre en application des plans pour des nouveaux programmes, des projets spéciaux, des projets d'acquisition de matériel et d'appareils ainsi que des projets de dotation dans leur service ou entreprise;

- Plan and control departmental or establishment budget

- planifier et contrôler le budget du service ou de l'établissement;

- Represent the department or establishment at meetings with government officials, the public, the media and other organizations

- représenter le service ou l'établissement lors de réunions avec des représentants du gouvernement, le grand public, les médias et autres organismes;

- Supervise health care supervisors and professionals

- surveiller les activités des superviseurs en soins de santé et des autres professionnels;

- Recruit health care staff of the department or establishment.

- recruter le personnel médical du service ou de l'établissement.

Managers in health care specialize in administering the provision of specific health care services such as dietetics, clinical medicine, laboratory medicine, nursing, physiotherapy or surgery.

Les directeurs des soins de santé se spécialisent dans l'administration de soins de santé particuliers tels que la diététique, la médecine clinique, la médecine de laboratoire, les soins infirmiers, la physiothérapie ou la chirurgie.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-5816-12

STYLE OF CAUSE: SHERIF MOHAMED RASHED v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: February 19, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** SHORE J.

DATED: February 20, 2013

APPEARANCES:

Stephen J. Fogarty FOR THE APPLICANT

Michèle Joubert FOR THE RESPONDENT

SOLICITORS OF RECORD:

Fogarty Law Firm FOR THE APPLICANT
Montreal, Quebec

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada
Montreal, Quebec