Federal Court Cour fédérale

Date: 20140912

Dockets: IMM-5004-13
IMM-5012-13
IMM-5014-13
IMM-5016-13

Citation: 2014 FC 866

Ottawa, Ontario, September 12, 2014

PRESENT: The Honourable Mr. Justice Russell

Docket: IMM-5004-13

BETWEEN:

WILMER OMAR PORTILLO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

Docket: IMM-5012-13

AND BETWEEN:

TAMMILEE LISHAUN PASCASCIO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

Docket: IMM-5014-13

AND BETWEEN:

JULIE GERTRUDEZ REQUENA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

Docket: IMM-5016-13

AND BETWEEN:

SIOMARA ZURIEDA HARRIS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

JUDGMENT AND REASONS

INTRODUCTION

[1] These are four applications under s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of decisions denying work permits to each of the four Applicants [Applications]. All of the decisions were made by the same visa officer [Officer] at the Canadian visa office in Guatemala City, Guatemala, in late May and early June 2013 [Decisions]. The Applications were heard together pursuant to the orders of Justice Mactavish who granted leave in each case on March 21, 2014.

BACKGROUND

[2] All of the Applicants are citizens and residents of Belize, and all were recruited to work at McDonald's restaurants in Canada under the Temporary Foreign Worker Program. The prospective employers, who are the owners/operators of two separate McDonald's franchises in Canada, used the recruiting firm Actyl Group Inc. [Actyl] to find and screen applicants, and then interviewed the candidates via video or teleconference. An offer of employment was made to each of the Applicants, and positive Labour Market Opinions (LMO's) were obtained from Service Canada allowing the employers to hire foreign nationals for the positions in question – all full-time positions as Food Service Counter Attendants, corresponding to National Occupational Classification (NOC) 6641.

[3] Before coming to Canada to begin their employment, each Applicant had to obtain a work permit from Citizenship and Immigration Canada (CIC). This meant they had to meet the requirements of Part 11 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227

[Regulations], which govern who may become a temporary resident in the worker class. The work permit Applications of the four Applicants were all refused, essentially on the same grounds. The Decision letters sent to the Applicants all indicated (in the form of a checklist on which the Officer checked the appropriate grounds of refusal) that:

> You were not able to demonstrate that you adequately meet the job requirements of your prospective employment.

And:

> You have not satisfied me that you would leave Canada by the end of the period authorized for your stay. In reaching this decision, I considered several factors, including:
>
> […]
>
> purpose of visit

[4] In challenging these Decisions here, each of the Applicants has raised essentially the same grounds and arguments, though there are differences in the underlying facts of each case. All of the Applicants are represented by the same counsel, and each Application is supported by affidavit evidence from Actyl stating that there was an unusually high rate of rejections of work permit applications from Belize at the time in question.

[5] The individual Applicants and the relevant facts pertaining to each Application are as follows.

[6] Wilmer Omar Portillo [Mr. Portillo] is a 20-year-old citizen of Belize and a resident of Blackman Eddy Village in the Cayo District. He was offered employment at a McDonald’s

restaurant in Fernie, British Columbia. The record before the Officer showed that Mr. Portillo was single and had no dependents, and that he had a high school diploma and was studying Marine Biology at the University of Belize. He had previously worked as a waiter at Rosa's Restaurant and as assistant mechanic at Bit Boyz Garage, and continued to work part time at Carmen's Food/Veggies Stall, a family business. He provided reference letters from the Owner/Manager of Rosa's Restaurant, a Lecturer at the University of Belize, and his mother and aunt who operate the fruit stand and food stall where he worked part time. He wrote on his Low Skill Project Application Supplementary Information form that following his 24 months in Canada he planned to "Return to Belize to upgrade family business," and that his long-term plans were "to return home to my country to help my mom in our small family business in vending and preparing food."

[7] Tammilee Lishau Pascascio [Ms. Pascascio] is a 20-year-old citizen of Belize and a resident of Belmopan in the Cayo District. She was offered employment at a McDonald's restaurant in Fernie, British Columbia. The record before the Officer showed that she was single and had no dependents, had a high school diploma and was studying Natural Resource Management at the University of Belize. She had previously worked as a waitress at the Grape and Grain Lounge, volunteered in the hospitality department of Youth With a Mission (for one month), worked as a telemarketer for Captain Marketing, and had done various summer internships with departments of the Government of Belize. She provided reference letters from the Hospitality Manager at Youth With a Mission, a Postal Assistant at the Belmopan Post Office where she had completed an internship, and from her mother. She wrote on her Low Skill Project Application Supplementary Information form that following her 24 months in Canada she

planned to "Return to Belize," and with respect to her long-term plans that "I have a plot of land and I want to be able to take it and invest in a small business for myself."

[8] Julie Gertrudez Requena [Ms. Requena] is a 32-year-old citizen of Belize and a resident of Benque Viejo Town in the Cayo District. She was offered employment at a McDonald's restaurant in Rocky Mountain House, Alberta. The record before the Officer showed that she was a single mother with two children aged 12 and 9, who would be cared for by Ms. Requena's parents in Belize while she was working in Canada. She had a high school diploma and a Certificate in Tourism Front Office – Level 1 from the Cayo Center for Employment Training. She was working as a secretary for an organization called Special Tactical and Rescue Security Service (STARSS), and had previously worked as a secretary for the Arqitekton Company Limited (part time), as well as in an unspecified role at the Mopan River Resort and as a home economics and sewing teacher (part time) at Mopan High School. She provided reference letters from an instructor at the Cayo Center for Employment Training, a nurse who had known her for many years, the owner of the Arqitekton Company Limited and the Manager of STARSS. She also included a letter signed by herself and her parents stating that the parents would be caring for her children in her absence. She wrote on her Low Skill Project Application Supplementary Information form that following her 24 months in Canada she planned to "Return to my home Belize," and with respect to her long-term plans that "I will come back home and invest in an infrastructure to create a business of my own."

[9] Siomara Zurieda Harris [Ms. Harris] is a 27-year-old citizen of Belize and a resident of San Ignacio Town in the Cayo District. She was offered employment at a McDonald's restaurant

in Rocky Mountain House, Alberta. The record before the Officer showed that she had a common-law spouse and two children aged 6 and 9 who would not accompany her to Canada. She had a primary school diploma and a Certificate in Tourism & Hospitality – Level 1 from the Cayo Center for Employment Training. She had previously worked at Midas Resort performing front desk, waitress / table setting, bartending and housekeeping duties. She had also performed domestic, cooking and housekeeping duties at the Pallotine Sisters' Convent, worked as a grocery store attendant at Celina's Super Store, and was currently working as a supervisor at Cold Front Ideals. She included a letter from her mother stating that the mother would be responsible for the care of Ms. Harris' children in her absence, as well as a supportive letter from her common-law spouse, and reference letters from the owner/manager of Cold Front Ideals, the manager/owner of Midas Resort, the manager/owner of Celina's Super Store, and an instructor at the Cayo Center for Employment Training. She wrote on her Low Skill Project Application Supplementary Information form that following her 24 months in Canada she planned to "Return to Belize," and that her long-term plans were to "With knowledge and skills gained return to my country and open a business."

DECISIONS UNDER REVIEW

[10] The Officer, identified in the Global Case Management System notes [GCMS notes] as "CSO1556," denied each of the four work permit Applications on the same grounds in late May and early June 2013. In addition to the checklists identifying these grounds, as set out above, the GCMS notes contain the Officer's analysis and explanation for the denials in each case.

[11] With respect to Mr. Portillo, the Officer wrote in the GCMS notes on June 5, 2013:

> M, BZE, 19, SINGLE, NO DEPS. CURRENTLY WORKING AT CARMEN'S FOOD/VEGGIES (FAMILY BUSINESS) PART TIME SINCE JAN05 TO PRESENT. PREV WORKED AT BIT BOYZ GARAGE AS ASSISTANT MECHANIC/PART TIMES FROM 2007 TO 2010 AND AT ROSA'S RESTAURANT AS WAITER FROM JAN 2010 TO SEPT 2012 (STARTED WHEN PA WAS MINOR) ALSO STUDYING AT UNIVERSITY OF BELIZE: ASSOCIATES DEGREE IN MARINE BIOLOGY TO WORK AT McDONALD'S RESTAURANT IN NORTH BATTLEFORD, SK FOR 24 MONTHS. POSITION DESCRIPTION: FOOD SERVICE COUNTER ATTENDANT EXPERIENCE AND EDUCATION: PARTIAL HIGH SCHOOL EDUCATION OR EQUIVALENT PREFERRED + PREVIOUS QUICK SERVICE RESTAURANT EXPERIENCE (PREFERABLY McDONALD'S + BASIC, READING, WRITING AND MATH SKILLS. RECEIVED: - BZE PC: NRT - CV - INFORMAL EMPLOYMENT LETTER FROM FIRST EMPLOYER - COPY SCHOOL DIPLOMA I HAVE CONCERNS. NO GOOD PROOF OF EXPERIENCE FOR THE REQUIRED JOB. APPLN REFUSED.
>
> [emphasis added]

[12] With respect to Ms. Pascascio, the Officer wrote in the GCMS notes on June 5, 2013:

> M, BZE, 19, SINGLE, NO DEPS. CURRENTLY WORKING AT GRAPE AND GRAIN LOUNGE AS WAITRESS (MAR TO JUNE 20130 PREV WORKED AT YOUTH WITH A MISSION AS HOSPITALITY FROM JAN TO FEB 2013 AND AT CAPATAIN MARKETING AS TELEMARKETER FROM NOV TO DEC 2012 TO WORK AT McDONALD'S RESTAURANT IN NORTH BATTLEFORD, SK FOR 24 MONTHS. POSITION DESCRIPTION: FOOD SERVICE COUNTER ATTENDANT EXPERIENCE AND EDUCATION; PARTIAL HIGH SCHOOL EDUCATION OR EQUIVALENT PREFERRED + PREVIOUS QUICK SERVICE RESTAURANT EXPERIENCE (PREFERABLY McDONALD'S + BASIC, READING, WRITING AND MATH SKILLS. RECEIVED: - BZE PC: NRT - CV - LETTER FROM PREV ER - COPY SCHOOL DIPLOMA I HAVE CONCERNS. NO PROOF OF EXPERIENCE FOR THE REQUIRED JOB. APPLN REFUSED.
>
> [emphasis added]

[13] With respect to Ms. Requena, the Officer wrote in the GCMS notes on May 28, 2013:

> F, BZE, 31, SINGLE, 2 DEPS LISTED, TO WORK AT McDONALD'S RESTAURANT AS FOOD SERVICE COUNTER ATTENDANT FOR 24 MONTHS EXPERIENCE/EDUCATION REQUIRED: - Partial high school education or equivalent experience preferred –Basic reading, writing, and match skills -Previous Quick Service Restaurant Experience (preferably McDonald's) SECRETARY AT SPECIAL TAXABLE AND RESCUE SECURITY SERVICES SINCE APR 2013. PREV WORKED AT ARQITEKTON LTD AS SECRETARY (PART TIME) AT MOPAN RIVER RESORT AS FRONT DESK CLERK AT MOPAN HIGH SCHOOL AS TEACHER (PART TIME) RECEIVED: - COPY HIGH SCHOOL DIPLOMA - 2 INFORMAL REFERENCE LETTERS - 2 FORMAL EMPLOYMENT LETTERS - BZE PC - BC OF DTR REBECA: WAS BORN IN USA IN JUNE 2003. NO USA VISA ON PPT I HAVE CONCERNS. NO CLEAR INTENTIONS, NOT WELL ESTABLISHED IN BZE. I AM NOT SATISFIED THAT PA MEETS REQS. APPLN REFUSED.
>
> [emphasis added]

[14] With respect to Ms. Harris, the Officer wrote in the GCMS notes on May 28, 2013:

> F, BZE, 24. C-L-S AND 2 CHILDREN LISTED. SPOUSE WORKS AS HEAVY DUTY OPERATOR AT BELIZE WATER SERVICE, TO WORK AT McDONALD'S RESTAURANT AS FOOD SERVICE COUNTER ATTENDANT FOR 24 MONTHS EXPERIENCE/EDUCATION REQUIRED: -Partial high school education or equivalent experience preferred –Basic reading, writing, and match skills – Previous Quick Service Restaurant Experience (preferably McDonald's) WORKS AT COLD FRONTS IDEAL AS FACTORY WORKER/SUPERVISOR PREV WORKED AT MIDA'S RESORT AS WAITRESS/BARTENDER/FRONT DESK FROM FEB09 TO DEC03 (ACCORDING TO FORM) AT PALLOTINE SISTER'S CONVENT AS DOMESTIC/COOK/HOUSEKEEPER AT CELINA'S SUPER STORE AS CUSTOMER SERVICE RECEIVED: - 2 INFORMAL REFERENCE LETTERS - 2 FORMAL EMPLOYMENT LETTERS. ONE FROM MIDA'S RESORT INDICATING PA DID HER PRACTICAL TRAINING THERE IN YEAR 3003. - BZE PC - LETTER FROM CAYO CENTRE FOR EMPLOYMENT TRAINING: STUDIED TOURISM HOSPITALITY SERVICE FROM JAN TO DEC

> 2013. I HAVE CONCERNS. NOT WELL ESTABLISHED IN BZE, I AM NOT SATISFIED THAT PA MEETS REQS. APPLN REFUSED.
>
> [emphasis added]

ISSUES

[15] The following issues arise for the Court's consideration with respect to each of the four Applications:

a. Did the Officer err in his or her assessment of the Applicants' ability to perform the job offered?

b. Did the Officer err in his or her assessment of the Applicants' intentions to leave Canada by the end of the two-year period of temporary residence?

c. Did the Officer deny the Applicants procedural fairness either by:

    i. Failing to conduct an interview with the Applicants, or

    ii. Reaching a decision without conscientious analysis of the documents submitted with the Applications?

STANDARD OF REVIEW

[16] 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 [*Agraira*].

[17] Decisions of visa officers regarding the issuance of temporary work permits are discretionary in nature, and are reviewable on a standard of reasonableness: *Calaunan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1494 at para 13. This is the standard that applies to issues a. and b. above.

[18] Issues of procedural fairness are reviewable on a standard of correctness: see *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Union of Public Employees (CUPE) v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 53. This is the standard that applies to issue c. above.

[19] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa,* 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decisions were unreasonable in the sense that they fall outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[20] The following provisions of the Act are applicable in these proceedings:

Application before entering Canada	**Visa et documents**
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
[…]	[…]
Obligation on entry	**Obligation à l'entrée au Canada**
20. (1) Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish,	20. (1) L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver :
[…]	[…]
(b) to become a temporary resident, that they hold the visa or other document required under the regulations and will leave Canada by the end of the period authorized for their stay.	b) pour devenir un résident temporaire, qu'il détient les visa ou autres documents requis par règlement et aura quitté le Canada à la fin de la période de séjour autorisée.
Temporary resident	**Résident temporaire**
22. (1) A foreign national becomes a temporary resident if an officer is satisfied that the	22. (1) Devient résident temporaire l'étranger dont l'agent constate qu'il a

foreign national has applied for that status, has met the obligations set out in paragraph 20(1)(b), is not inadmissible and is not the subject of a declaration made under subsection 22.1(1).	demandé ce statut, s'est déchargé des obligations prévues à l'alinéa 20(1)b), n'est pas interdit de territoire et ne fait pas l'objet d'une déclaration visée au paragraphe 22.1(1).
Dual intent	**Double intention**
(2) An intention by a foreign national to become a permanent resident does not preclude them from becoming a temporary resident if the officer is satisfied that they will leave Canada by the end of the period authorized for their stay.	(2) L'intention qu'il a de s'établir au Canada n'empêche pas l'étranger de devenir résident temporaire sur preuve qu'il aura quitté le Canada à la fin de la période de séjour autorisée.
[…]	[…]
Work and study in Canada	**Études et emploi**
30. (1) A foreign national may not work or study in Canada unless authorized to do so under this Act.	30. (1) L'étranger ne peut exercer un emploi au Canada ou y étudier que sous le régime de la présente loi.
Authorization	**Autorisation**
(1.1) An officer may, on application, authorize a foreign national to work or study in Canada if the foreign national meets the conditions set out in the regulations.	(1.1) L'agent peut, sur demande, autoriser l'étranger qui satisfait aux conditions réglementaires à exercer un emploi au Canada ou à y étudier.
[…]	[…]

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

Issuance	**Délivrance**
179. An officer shall issue a temporary resident visa to a	179. L'agent délivre un visa de résident temporaire à l'étranger

foreign national if, following an examination, it is established that the foreign national	si, à l'issue d'un contrôle, les éléments suivants sont établis :
(a) has applied in accordance with these Regulations for a temporary resident visa as a member of the visitor, worker or student class;	a) l'étranger en a fait, conformément au présent règlement, la demande au titre de la catégorie des visiteurs, des travailleurs ou des étudiants;
(b) will leave Canada by the end of the period authorized for their stay under Division 2;	b) il quittera le Canada à la fin de la période de séjour autorisée qui lui est applicable au titre de la section 2;
[…]	[…]
(d) meets the requirements applicable to that class;	d) il se conforme aux exigences applicables à cette catégorie;
[…]	[…]
Class	**Catégorie**
194. The worker class is prescribed as a class of persons who may become temporary residents.	194. La catégorie des travailleurs est une catégorie réglementaire de personnes qui peuvent devenir résidents temporaires.
Worker	**Qualité**
195. A foreign national is a worker and a member of the worker class if the foreign national has been authorized to enter and remain in Canada as a worker.	195. Est un travailleur et appartient à la catégorie des travailleurs l'étranger autorisé à entrer au Canada et à y séjourner à ce titre.
[…]	[…]
Application before entry	**Demande avant l'entrée au Canada**
197. A foreign national may apply for a work permit at any	197. L'étranger peut, en tout

time before entering Canada.

temps avant son entrée au Canada, faire une demande de permis de travail.

[…]

[…]

Work permits

200. (1) Subject to subsections (2) and (3) - and, in respect of a foreign national who makes an application for a work permit before entering Canada, subject to section 87.3 of the Act - an officer shall issue a work permit to a foreign national if, following an examination, it is established that

Permis de travail - demande préalable à l'entrée au Canada

200. (1) Sous réserve des paragraphes (2) et (3), et de l'article 87.3 de la Loi dans le cas de l'étranger qui fait la demande préalablement à son entrée au Canada, l'agent délivre un permis de travail à l'étranger si, à l'issue d'un contrôle, les éléments ci-après sont établis :

[…]

[…]

(b) the foreign national will leave Canada by the end of the period authorized for their stay under Division 2 of Part 9;

b) il quittera le Canada à la fin de la période de séjour qui lui est applicable au titre de la section 2 de la partie 9;

(c) the foreign national

c) il se trouve dans l'une des situations suivantes :

[…]

[…]

(iii) has been offered employment, and an officer has made a positive determination under paragraphs 203(1)(a) to (e); and

(iii) il a reçu une offre d'emploi et l'agent a rendu une décision positive conformément aux alinéas 203(1)a) à e);

[…]

[…]

Exceptions

(3) An officer shall not issue a work permit to a foreign national if

Exceptions

(3) Le permis de travail ne peut être délivré à l'étranger dans les cas suivants :

(a) there are reasonable grounds to believe that the foreign national is unable to perform the work sought;	a) l'agent a des motifs raisonnables de croire que l'étranger est incapable d'exercer l'emploi pour lequel le permis de travail est demandé;
[…]	[…]
Assessment of employment offered	**Appréciation de l'emploi offert**
203. (1) On application under Division 2 for a work permit made by a foreign national other than a foreign national referred to in subparagraphs 200(1)(c)(i) to (ii.1), an officer must determine, on the basis of an opinion provided by the Department of Employment and Social Development, of any information provided on the officer's request by the employer making the offer and of any other relevant information, if	203. (1) Sur présentation d'une demande de permis de travail conformément à la section 2 par tout étranger, autre que celui visé à l'un des sous-alinéas 200(1)c)(i) à (ii.1), l'agent décide, en se fondant sur l'avis du ministère de l'Emploi et du Développement social, sur tout renseignement fourni, à la demande de l'agent, par l'employeur qui présente l'offre d'emploi et sur tout autre renseignement pertinent, si, à la fois :
[…]	[…]
(b) the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada;	b) le travail de l'étranger est susceptible d'avoir des effets positifs ou neutres sur le marché du travail canadien;

ARGUMENT

A. *Applicants*

[22] The Applicants argue that there was no reasonable basis for the Officer to find that they were unqualified for the positions they were offered and to deny their work permit Applications

based on that finding. They note that under s. 200(3)(a) of the Regulations, an officer is not to issue a work permit to a foreign national if "there are reasonable grounds to believe that the foreign national is unable to perform the work sought." However, each of the Applicants was interviewed by the prospective employer, and was found to be a right fit based on education, previous employment, language skills and overall personality. The Applicants say the job advertisement and LMO Application in each case stated with respect to prior experience: "No experience required, on the job training providing, (sic) although some previous experience in the fast food industry (McDonald's) would be preferred."

[23] The Applicants point to *Randhawa v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1294 at para 17 [*Randhawa*], where Justice Kelen found that "[w]hile it is reasonable to require that an applicant satisfy the job requirements of a particular position before obtaining a work visa, it is unreasonable not to take into account some measure of job orientation that would inevitably be provided to the claimant." Moreover, Justice Blais (as he then was) in *Gao v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 350 at para 21, 184 FTR 300 [*Gao*], found that in the absence of a standard test, a visa officer was not in a position to assess the employment skills of an applicant. In following that decision in *Chen v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 594 at para 23, 190 FTR 260 [*Chen*], Justice Blais observed: "Are visa officers going to assess employment skills of engineers?, of chefs? Obviously, they are not in a position to do so."

[24] The Applicants note that the CIC document checklist for a work permit requires that applicants include "proof indicating you meet the requirements of the job being offered." To

fulfill this requirement, each of them provided letters from current and/or former employers demonstrating customer service experience. The LMOs issued by Service Canada do not state that experience is required, and the employers in question found each of them able to perform the duties of a Food Counter Attendant, as described in NOC 6641.

[25] The Applicants argue that the Officer denied them work permits on the basis that they are wrongly qualified or overqualified for the positions they were offered, and that it is wrongful and unlawful discrimination to deny someone a job opportunity on the basis that they are overqualified: *Sangha v Mackenzie Valley Land and Water Board*, 2007 FC 856.

[26] The Applicants argue that the Officer also erred in assessing their intentions to leave Canada by the end of their employment contracts, and they should have been given an opportunity to clarify any doubts the Officer had on this issue through an interview. They point to *Li v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1284, where Justice Beaudry found that nothing in the application other than a higher salary in Canada suggested that the applicant intended to stay in Canada permanently, and an interview should have been conducted to allow him to respond to the officer's concerns. The Applicants argue that the Officer breached the requirements of natural justice by not giving them an opportunity to dispel any concerns or misconceptions.

[27] The Officer wrongly concluded that the Applicants would violate Canadian law by overstaying illegally, and there was no basis whatsoever for the shocking and unreasonable assumption that they would be law-breakers. None of the Applicants has a criminal record or any

history of violating immigration or other laws, and all provided references. Each of the Applicants emphasized that they have strong family ties to Belize and fully intend to return there. Ms. Requena and Ms. Harris both have children who will be cared for by family members in Belize while they are in Canada. Most of the Applicants have travel histories showing a willingness to return to Belize, including travels to Mexico and Guatemala (Mr. Portillo), Guatemala and the USA (Ms. Requena), and Guatemala (Ms. Harris).

[28] The Applicants also allege that the Officer breached procedural fairness by coming to a decision without a conscientious analysis of the documents submitted with their Applications. They note that the Decisions were made within 14 to 18 days of being mailed, which is in contrast to the processing times for other work permit applications that have been approved, including one which they cite that took 91 days to process. They say their Applications were decided too quickly without giving them an opportunity to make clarifications on any of the documents submitted, and this violates the participatory rights called for in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], which require a fair and open process with an opportunity for those affected to put forward their views and evidence fully and to have them considered.

B. *Respondent*

[29] The Respondent argues that the positions offered to each of the Applicants required previous quick service restaurant experience, preferably at McDonald's, as set out in the Position Description attached to the Employment Contract that each of the Applicants signed, which was part of the record before the Officer. This requirement was a term of each of the employment

contracts, and the LMOs required the terms and conditions of those contracts to match those described in the LMOs. The Applicants have provided no evidence for their allegation that the applicable LMOs "[do] not require specific work experience," and in fact the record establishes that both the employer and the LMO required "previous quick service restaurant experience (McDonald's preferred)." The Officer was not satisfied, based on the materials submitted, that the Applicants had demonstrated previous quick service restaurant experience, and this conclusion was within the range of possible and acceptable outcomes.

[30] The Respondent notes that each of the Applicants provided letters of reference but no other documents, such as employment, pay or tax records, to demonstrate their previous employment.

[31] The Respondent argues that *Randhawa*, above, is distinguishable, since the work permit in that case was denied due to the officer's concerns that the applicant would be unable to observe principles of hygiene as a cook. The Court emphasized that visa officers are not in a position to assess an applicant's employment skills and that job orientation related to sanitation requirements should be considered. By contrast, in the cases at hand, the Officer did not deny the Applications because he or she found the Applicants' skills to be insufficient. Rather, the Officer considered whether the Applicants had satisfied an objective criterion identified in the LMOs as a job requirement. No orientation of the Applicants would satisfy the job requirement of previous quick service restaurant experience. An applicant must establish that she/he meets the requirements of the job for which she/he seeks to come to Canada. In these cases, the Applicants

did not meet the burden of establishing that they met the experience requirement of the job description.

[32] The Respondent also says that the Officer had reasonable concerns about the Applicants' intentions to leave Canada at the end of their contracts, and did not breach procedural fairness by denying their Applications on this basis and without interviewing them.

[33] Paragraph 200(1)(b) of the Regulations places the onus on an applicant to establish that they will leave Canada by the end of the period authorized for their stay. If the officer is not satisfied on this issue, then there are sufficient grounds to deny the application. The onus is on an applicant to provide all relevant supporting documentation and sufficient credible evidence in support of their application: *Pacheco Silva v Canada (Minister of Citizenship and Immigration)*, 2007 FC 733 at para 20. The Respondent says each of the Applicants provided minimal information to establish that they would return to Belize, including on their Low Skill Project Application Supplementary Information forms which provided an opportunity to submit further information. Thus, the Officer's conclusion that the Applicants had not demonstrated they would leave Canada and return to Belize was within the range of acceptable outcomes.

[34] In addition, there was no requirement to interview the Applicants. As noted, the onus is on an applicant to satisfy the officer on all parts of the application. There is no duty to inform a worker class permit applicant about an officer's concerns when they arise directly from the requirements of the legislation or regulations: *Hassani v Canada (Minister of Citizenship and*

Immigration), 2006 FC 1283 at paras 23-24; *Gulati v Canada (Minister of Citizenship and Immigration)*, 2010 FC 451 at para 43 [*Gulati*].

[35] Moreover, procedural fairness requirements are low in these circumstances, particularly where there is no evidence of serious consequences to the applicant: *Qin v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 815 at para 5. A lack of serious consequences has been found where applicants are able to re-apply for work permits and there is no evidence that doing so will cause them hardship: *Masych v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1253 at para 30.

[36] In the present cases, the Respondent argues, the requirement to establish that the Applicants would leave Canada clearly arises directly from the legislation, and the Applicants have the ability to re-apply for worker permits so that the refusal does not give rise to serious consequences. Thus, the Officer did not commit a breach of procedural fairness by not offering them interviews.

[37] Nor, the Respondent argues, did the Officer deny procedural fairness by reaching a decision without conscientious analysis of the documents submitted with the Applications. The Officer is presumed to have reviewed all of the evidence (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA)), and is not required to make reference to every document submitted (*Hassan v Canada (Minister of Employment and Immigration)*(1992), 147 NR 317 (FCA)). The GCMS notes make a number of references to information submitted by each Applicant. The fact that the Decisions were made more quickly

than other work permit applications does not by itself indicate that these Applications were not fully assessed.

C. *Applicants' Reply and Further Submissions*

[38] The Applicants reply that each of them has more than the required experience to perform the job offered. The employer in each case found them to be qualified based on an interview, their resumés and letters of reference.

[39] The Applicants say they provided proof that they met the requirements of the job in the form of reference letters demonstrating customer service experience, and that the CIC document checklist does not require other documents such as employment, pay or tax records to demonstrate previous employment. Since this requirement does not exist in the relevant legislation or regulations, the Applicants should have been made aware of it and given an opportunity to provide further information: *Qin v Canada (Minister of Citizenship and Immigration)*, 2013 FC 147 at para 38.

[40] The Applicants argue that the Respondent's narrow reading of *Randhawa*, above, to be only about hygiene ignores paragraphs 7 and 12, which state:

> [7] As indicated in the CAIPS notes, the visa officer concluded that Mr. Randhawa was unable to perform the duties required of an assistant cook:
>
> > Conclusions: Despite his stated completion of a hygiene course, I am not satisfied that the applicant would be able to adequately observe principles of hygiene as required by his job contract. I also note that I checked with several other people in the office about his explanation as to how to test

> whether or not chicken is fresh (i.e., the explanation about the bloated chicken) and none of them had ever heard of it, either. Said before that chicken could be kept in the fridge for 3 weeks before it goes bad.
>
> Not satisfied applicant can perform the duties sought. Not satisfied he meets reqts of job confirmation letter.

The visa officer issued a written decision letter refusing Mr. Randhawa's application for a work permit. The visa officer selected from the form letter the following two reasons applicable to her refusal:

> Although you have presented a confirmation letter from Human Resources and Skills Development Canada referring to the economic effect of your employer's job offer to a foreign national, I am not satisfied that you are able to perform the work sought as required by R200(3)(a) of the *Immigration and Refugee Protection Regulations*.
>
> Although you have presented a confirmation letter from Human Resources and Sills Development Canada, I am not satisfied that you meet the requirements of the job as specified in the job offer confirmation.
>
> [Emphasis added]

[…]

[12] This Court in *Chen v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 594 per Mr. Justice Blais held that visa officers are not in a position to assess the employment skills of an applicant and specifically held that it is improper for a visa officer to assess the employment skills of a chef. Justice Blais held at paragraph 23:

> Are visa officers going to assess employment skills of engineers?, of chefs? Obviously, they are not in a position to do so.

[41] In the present case, the LMOs themselves do not state that quick service experience is required, nor does the description of the position of Food Counter Attendant in NOC 6641. The latter states only that:

- Some secondary school education is usually required.
- On-the-job training is provided.

[42] The Applicants argue that the phrase "quick service restaurant" has only recently come into common use, and only one general dictionary (Oxford English Dictionary, 1989) was found to contain the term. While generally considered a synonym for "fast food restaurant," the Applicants argue that it should be interpreted more broadly to include any establishment that prepares and serves food quickly, especially when it comes to evaluating employee qualifications. The term is not yet fully developed, and should be considered ambiguous and confusing.

[43] The Applicants further argue that the content of the duty of procedural fairness in a given context must be established by reference to the five factors set out in *Baker*, above: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the agency itself.

[44] The Applicants note that in *Gulati*, cited by the Respondent, Justice Mosley concluded at para 45 that while made in a procedurally fair manner, the decision under review was unreasonable "in that it was made without regard to relevant evidence, relied on an unreasonable

interpretation of the lead statement of NOC 6212, and did not meet the standards of transparency and intelligibility."

[45] The Applicants argue that *Serrudo Sempertegui v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1176 provides support for their position that the Officer erred in assessing their intentions to leave Canada. Justice Harrington observed at paras 8-10:

> [8] Other than the fact that Ms. Sempertegui is a single woman in her 20s, no other reason was given to fuel the suspicion that she would not leave when her visa expired. While she may well have a dual intention, s. 22(2) of the Immigration and Refugee Protection Act specifically provides that that is no reason to reject an application.
>
> [9] It is true that the burden is upon the applicant to satisfy the officer, but there are some officers who simply will not be satisfied, no matter what. Ms. Sempertegui has a widowed father and two sisters living in Bolivia. No mention was made of that in the CAIPS notes. The visa officer's suspicions were not based on reasonable inferences drawn from the known facts, and so the decision is unreasonable.
>
> [10] Her ties to Bolivia were not plumbed. Nor was the fact that it has been amply demonstrated that Ms. Sempertegui, along with her sponsors, play by the rules. There is no objective basis for the decision.

[46] The Applicants also point to Justice Scott's analysis in *Shirazi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 306 where he found that the officer had failed to explain the basis for his or her conclusion (in that case, that the applicant had not performed a substantial number of the main duties set out in the relevant NOC description) and the decision was therefore unreasonable. Even though the decision was a discretionary one, "the reasonableness of a decision stands on its transparency and intelligibility" (at para 32) and this standard was not met.

[47] Finally, the Applicants argue that they have been held to a different standard by reason of their country of origin in a manner that is procedurally unfair. They note that they were required to submit an extra form (the Low Skill Project Application Supplementary Information form) because the jobs in question are classified as low-skilled jobs. They claim that applicants for the same type of position whose applications are processed by visa offices in Mexico or Jamaica are not required to provide such a form, or to provide any extra documentary evidence regarding their intent to return to their home country or their employment history.

[48] In further submissions the Applicants address the issue of the proper remedy should the Court find in their favour. They say the Decisions should be set aside and sent back for reconsideration by a different visa officer (preferably not in the Guatemala City visa office). Moreover, they argue that the reconsiderations should be conducted based on the existing information provided with their work permit Applications, the existing LMOs, and the practices and procedures in place at the time of the first Decisions. In particular, they say the new decisions must be made based on the Temporary Foreign Worker Program as it existed prior to April 24, 2014. Changes announced on that date imposed an immediate moratorium on that program as it pertained to the Food Services Sector. It was announced that Employment and Social Development Canada (ESDC) will not process any new or pending LMO applications related to the Food Services Sector, and any unfilled positions tied to a previously approved LMO are suspended, pending the completion of an on-going review of the Program. The Applicants argue that in order for fairness and justice to be done here, it must be possible for the Applicants to be restored to the same position they would have been in had the initial Decisions

been favourable. In other words, they must be able to obtain a visa to travel to and work in Canada.

ANALYSIS

[49] As the GCMS notes make clear, the Applications were refused because the Officer had "CONCERNS" in each case.

[50] As regards Mr. Portillo, those concerns were "NO GOOD PROOF OF EXPERIENCE FOR THE REQUIRED JOB." The same concern was given for Ms. Pascascio: "NO GOOD PROOF OF EXPERIENCE FOR THE REQUIRED JOB." For both of these Applicants, the Officer also ticked the box indicating concerns about return to Belize.

With Ms. Requena, the concerns were "NO CLEAR INTENTION, NOT WELL ESTABLISHED IN BZE. I AM NOT SATISFIED THAT PA MEETS REQS." The same grounds arise over the refusal of Ms. Harris' Application: "NOT WELL ESTABLISHED IN BZE. I AM NOT SATISFIED THAT PA MEETS REQS."

[51] The Decisions are obviously problematic in various ways. For example:

- With respect to both Mr. Portillo and Ms. Pascascio, the Officer states that they were offered positions in North Battleford, SK, when in fact both were offered positions in Fernie, BC;
- For Mr. Portillo, the GCMS notes say nothing about concerns he will not return to Belize, though this is checked as a ground of refusal in the refusal letter. The same is true for Ms. Pascascio;
- With respect to both Ms. Requena and Ms. Harris, the Officer notes that they are "not well established in [Belize]," but no explanation is offered for this finding. Each of these women

> has two children in Belize (who were not accompanying them to Canada), their parents live there, they are citizens of Belize and have lived, worked and studied there, and Ms. Harris has a common-law spouse (since 2004) living there. Given these facts, there is no reasonable basis for the Officer's conclusion that they were "not well established" in Belize and posed a risk not to leave Canada when their work permits expired.

[52] These problems require the Court to consider the principles outlined in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at paras 11-16 [*Newfoundland Nurses*], according to which the inadequacy of reasons offered in support of a decision is not a stand-alone basis for quashing it, and in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers*], where the Court found that where there is no a duty to provide reasons, or only limited reasons are required, it is appropriate to look to the record and "to consider the reasons that could be offered for the decision when conducting a reasonableness review" (at para 54).

[53] Given recent jurisprudence accepting very brief reasons as adequate for very important decisions (see for example the Supreme Court's decision in *Agraira*, above), extensive reasons were not required here, and it is clear that the inadequacy of the reasons is not itself a basis for quashing the Decisions. On the other hand, the Court must be able "to understand why the tribunal made its decision" (*Newfoundland Nurses*, above, at para 16), and must not "[cast] aside an unreasonable chain of analysis in favour of the court's own rationale for the result" (*Alberta Teachers*, above, at para 54, quoting *Petro-Canada v British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, 276 BCAC 135 at paras 53, 56). The question, it seems to me, is whether there is a basis for the Decisions on the record that allows the Court to understand why

the Decisions were made, or whether, on the contrary, the reasons reveal "an unreasonable chain of analysis" that requires them to be reconsidered.

[54] The concern about lack of experience engages several issues. The Applicants say the employer in each case indicated on its advertisement and Labour Market Opinion Application that no experience was required and on the job training would be provided, "although some previous experience in the fast food industry (McDonald's) would be preferred." However, the Applicants do not point to any evidence on the record that would substantiate this. On the other hand, the Position Description attached to the Employment Contract signed by each Applicant, which is part of the certified record and was before the Officer, lists "Previous Quick Service Restaurant Experience (Preferred McDonald's)" under the heading "EXPERIENCE AND EDUCATION."

[55] I reject the Respondent's view that this listed qualification is part of the "terms and conditions" of the Employment Contract, which were required to match those approved in the LMO. A term or condition is an enforceable part of a contract. Absent some indication of mis-representation (which is a separate issue), the employer could not terminate, take any other action or seek any remedy against these employees on the basis that they did not have previous "quick service restaurant experience." Once the employee is hired, this qualification would appear to have no relevance to the employment relationship. It is therefore not, in my view, a term or condition of the Employment Contract.

[56] The question is whether the Officer was nevertheless entitled to evaluate and consider whether the Applicants had such experience as part of the Decisions the Officer was required to make. In my view, the decisions in *Randhawa, Gao*, and *Chen*, all above, support the Applicants' position that the Officer in this case was not in a position to assess their suitability and experience, or unreasonably imported suitability requirements that the employers did not consider necessary for the employment in question. There is no dispute that the Applicants' were offered the positions as part of an organized recruitment process on behalf of McDonald's and that they were offered positions based upon their resumés, interviews and revealed past experience. McDonald's was entirely happy with all aspects of their Applications and offered the Applicants jobs. It is entirely unreasonable for the Officer to say, on these facts, that he is not sure the Applicants meet the requirements when the employer is sure that they do. Without some explanation for the Officer's Decisions to override the employer on the issue of suitability, this aspect of the Decisions is unreasonable.

[57] As regards any assessment of intent not to leave Canada, there is no clear rationale for these Decisions given the facts of establishment in Belize in each case. However, the Respondent conceded before me that the suitability issue would also have to be part of the intent not to return analysis, so that this cannot really be considered as a separate ground.

[58] All in all, I have to conclude that the Decisions are not reasonable because they lack "justification, transparency and intelligibility" within the meaning of para 47 of *Dunsmuir*, above.

[59] Having decided that the Decisions are unreasonable, the Court must also consider an appropriate remedy in this case because, since the Decisions were made, a moratorium has been placed on the Temporary Foreign Water Program as it pertains to the Food Service Sector, and any unfulfilled positions tied to a previously approved LMO are suspended, pending completion of an on-going review of the Program.

[60] After hearing these Applications, the Court gave the Applicants until July 31, 2014 to provide further written submissions for special remedial relief in this case as requested in their Reply and Further Submissions. The July 31, 2014 deadline was set at the request of the Applicants' counsel.

[61] Notwithstanding this opportunity, the Applicants have failed to make further submissions or to establish on what grounds or jurisprudence the Court could do anything more than return the Decisions for reconsideration by a different officer. The Applicants have been given every opportunity to establish a case for additional relief but have not availed themselves of that opportunity. Consequently, the Court has nothing before it to establish and justify that relief. I think I have to conclude that although I can decide that the Officer erred in this case, I have no authority to now direct and dictate what particular immigration programs and policies should apply to reconsideration and that these matters are for the discretion of the Minister.

[62] Neither side has put forward a question for certification. In my view, there is none.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The Applications are allowed. The Decisions are quashed and the matters are returned for reconsideration by a different officer;
2. There is no question for certification; and
3. A copy of this judgment shall be placed on all four files.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5004-13
STYLE OF CAUSE:	WILMER OMAR PORTILLO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA
AND DOCKET:	IMM-5012-13
STYLE OF CAUSE:	TAMMILEE LISHAUN PASCASCIO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA
AND DOCKET:	IMM-5014-13
STYLE OF CAUSE:	JULIE GERTRUDEZ REQUENA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA
AND DOCKET:	IMM-5016-13
STYLE OF CAUSE:	SIOMARA ZURIEDA HARRIS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA
PLACE OF HEARING:	REGINA, SASKATCHEWAN
DATE OF HEARING:	JUNE 19, 2014
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	SEPTEMBER 12, 2014

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