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"Qui bene interrogat bene docet" "He who questions well teaches well"

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Current Methodologies for Identifying Labour Shortage[1]

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1. Background

Immigration and Refugee Protection Regulation 203(3) stipulates that officers must assess 7 factors when a Labour Market Impact Assessment (LMIA) decision is rendered. Regulation 203(3)(c) specifically requires that an officer determine "whether the employment of the foreign national is likely to fill a labour shortage".

My concern, in particular, is that the Federal government does not have a single national definition of 'labour market shortage' but it:

a. defined Occupation Lists (or list of Occupations-in-Demand) for decades for the Federal Skilled Worker Class; and

b. have been refusing and approving thousands of Labour Market Opinion (LMO) and LMIA requests without defining the concept.

Specifically, since 2002, Service Canada and Employment and Social Development Canada (ESDC) have not had a single

1 This is part 1 of a 2-part paper. Part 2 will appear in the June 2015 edition of *ImmQuest*.

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Current Methodologies for Identifying Labour Shortage

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national definition of the term "labour shortage". It is my opinion that officers of Service Canada have therefore been refusing LMIA's for more than a decade based on dubious labour shortage statistics (if any). I will support this argument by discussing the different methodologies used by each of these organizations to assess labour shortages from 9 September 2010 until 21 April 2015 (in chronological order).

I will also provide a brief overview of the methodologies used by Citizenship and Immigration Canada (CIC) in developing the Occupation Lists (in the Federal Skilled Worker Class) over the past 20 years. Notably, these methodologies were shrouded in secrecy for several decades.

Although Occupation Lists have finally been abolished, reference will be made to these methodologies as they can provide some understanding of the underlining policy issues. It is also provided because immigration practitioners can use it as a resource, when LMIA submissions are being prepared.

2. 9 September 2010: ESDC states there is no Methodology

ESDC stated in paragraph 2.5.2.3 of the Temporary Foreign Worker Manual Program (dated 9 September 2010) that ESDC does not have a definition of labour shortage.[2]

3. April 2011: Service Canada's Methodology in Western Canada

Without a national policy providing a definition of "labour market shortage", Service Canada's Western Territories developed their own policy in April 2011.[3] This policy was apparently used by officers when they made decisions for LMO (now LMIA) requests in British Columbia, Alberta, Saskatchewan, and Manitoba.[4] It was not a national policy and it was not included in Service Canada's national Temporary Foreign Worker Program Manual (according to the latest version that has been obtained). According to discussions held with Service Canada staff in Western Canada on 11 December 2014, this formula was not used by Service Canada in Vancouver and Edmonton in 2014. However, as we will see later, this information might not be accurate.

Here is a summary of the formulas developed by Service Canada in Western Canada in their policy on how to define "labour market shortages":

Factor 1: Employment growth

Percentage 1: % annual change of full time employment in a province for a specific National Occupation Classification (NOC)

Compared with

Percentage 2: % annual change of full time employment in a province for all Occupations

If Percentage 1 is larger than Percentage 2, it is an indication of a labour shortage

Factor 2: Wage growth

Comparison of two percentages

Percentage 1: % change in annual full time average wage in a province for specific NOC

Compared with

Percentage 2: % annual change of full time average wages in a province for all Occupations

If both are positive and Percentage 1 is greater the Percentage 2, then it is an indication of a shortage.

2 *Access to Information Act* request at Employment and Social Development, File number A-2012-00360/SS dated 8 January 2013.

3 *Access to Information Act* request at Employment and Social Development File A-2013-00629/HJK dated 6 February 2014.

4 *Ibid.*

Factor 3: Ratio of Employment Insurance (EI) claimants to employment

Comparison of two ratios

Ratio 1 (NOC): Average number of work ready EI claimants in a specific NOC over the past 2 years in a province

Divided by

Average number of people employed in a specific NOC over the past 2 years in a province

Ratio 2 (All Occupations): Average number of work ready EI claimants over the past 2 years in a province

Divided by

Average number employed over the past 2 years in a province

If Ratio 1 is below Ratio 2, then it is a positive indicator of a shortage

Factor 4: Change in number of EI claimants

Comparison between two percentages

Percentage 1: average annual percentage change in number of work ready EI claimants in a specific NOC over the past 2 years

Compared with

Percentage 2: average annual percentage change of work ready EI claimants over the past 2 years

If the number of EI claims in a NOC falls and is lower than the general number of claims, there may be a shortage.

Factor 5: Job vacancies

Annual percentage change in number of job bank vacancies.

If vacancies increase within 2 years, it is considered as a positive indicator of a shortage.

The sources are:

Alberta, Manitoba = jobbank.gc.ca
British Columbia = workBC.ca
Saskatchewan= Saskjobs.ca

Factor 6: Number of foreign workers requested

It is a comparison between 2 percentages:

Percentage 1: % change of number of foreign workers annually per NOC in a province between two years (i.e., 2012 compared with 2013)

Compared with

Percentage 2: % change of number of foreign workers annually per province between two years (i.e., 2012 compared with 2013)

If the first percentage is larger than the second percentage it is considered as a positive indicator of a shortage.

Factor 7: Future demands

Comparison between two percentages:

Percentage 1: Average number of forecasted job openings over the next 6 years (i.e., 2014–2020) in a province per NOC

Divided by

Average number employed in 2014 in a province per NOC

Percentage 2: Average number of forecasted job openings over the next 6 years (i.e., 2014–2020) in a province

Divided by

Average number employed in 2014 in a province

If the first percentage is greater than second percentage it is considered as a positive indicator of a shortage.

Comment:

This tool (that has unfortunately not been made public to employers for years) has excellent potential. Still, it is limited because it ignores regional differences in the labour market. The same formula is employed for small towns, e.g. Hudson Bay or Oxbow (both in Saskatchewan), as for a city like Saskatoon, which is the Achilles heel of the methodology. This methodology, then, cannot be used to accurately determine whether a shortage exists in a specific area of a specific province, as it distorts the figures about regional shortages within provinces.

4. 26 November 2012: ESDC Methodology

Two authors, Erwin Gomez and Marc Gendron from ESDC published an article named "*Indicators for Monitoring Labour Market Pressures in Canada*".[5] In this 54-page document (excluding Appendices), summaries of the methodologies to determine shortages used by some provincial governments as well as Human Resources and Skills Development (HRSDC) (as it was known before the organization's name was changed to ESDC) are provided. This is, in my opinion, a summary of Gomez and Gendron's most important findings:

(i) Approach of ESDC: ESDC uses the Occupational Tightness Model (OT) and the Canadian Occupational Projection System (COPS) to assess labour market shortages. The OT model uses historical employment and wage growth data; changes in the unemployment rate; as well as the amount of overtime worked. The COPS model uses employment growth, relative wage growth, and unemployment rate changes of the past 3 years.

(ii) Approach of Service Canada in the Atlantic Provinces: Service Canada in the Atlantic provinces uses the following indicators: EI Claims in a specific area; estimated job openings; projections from COPS; analyses of temporary foreign worker information; analyses of the supply side of information from colleges and universities; and analyses of data including tourism statistics and building permits. Then the predicted shortage is monitored through intelligence gathering in consultation with key labour market analysts.

(iii) Approach of the Province of Newfoundland: Newfoundland classifies occupations as good, fair, or with limited opportunities. Their conclusions are based on traditional employment statistics from the Labour Force Survey (also known as LFS) as well as the provincial Work Activity Survey (WAS) where unemployment numbers and impacts of seasonal employment play an important role.

(iv) Approach of the Province of Nova Scotia: Nova Scotia uses COPS demand projections of occupations in demand (provided by ESDC and the Conference Board of Canada). For the supply side, it uses EI claims as well as regional labour market pressures as provided by Service Canada analysts.

(v) Approach of Service Canada in Quebec: Service Canada in Quebec completes an analysis for 520 NOC codes based on 4 factors:

a) Forecast of employment growth

b) COPS attrition rates

c) EI claims

d) Projected employment over the next 2 years

(vi) Approach of the Province of Quebec: The following factors are used by the Province of Quebec: labour demand (based on projected economic growth); unemployment levels of the next 5 years; investment in major projects which are labour intensive; recent mass layoffs; labour market integration of recent graduates; creation and opening of businesses (as obtained from newspapers); number of new housing permits; sectorial reports; job vacancies according to websites and newspapers; and subjective "departmental perspectives". The province of Quebec also has a list of in-demand occupations that is used for immigration purposes. The decision to include an occupation in this list is based on three factors: (1) it must be in the list of occupations in demand; (2) it must have a low turnover rate; and (3) the unemployment rate must be below a certain threshold.

(vii) Approach of the Province of Ontario: Ontario relies on a model that uses past employment growth; earnings growth; average unemployment rate; LFS data; 2006 Census figures; future employment growth; average retirement rate; and private sector reports.

(viii) Approach of the Province of Saskatchewan: Saskatchewan uses COPS demand projections and projections by the provincial Ministry of Finance.

(ix) Approach of the Province of Alberta: Alberta's projected labour shortages are based on 7 factors: employment growth rate; unemployment rate; the ratio of the number of EI claims compared with number of employed

5 *Access to Information Act* request at Employment and Social Development Canada, file number AI-2014-00009/EM.

workers; participation rate based on the census; projected employment growth rate over the next 4 years as well as a qualitative input through different sources (such as industry environmental scan, vacancy rates, Alberta wage and salary Survey, number of Job Bank vacancies, and the number of nominations by the Alberta Immigrant Nominee Program). For each of the 7 factors, there is a threshold and if 6 of these thresholds are met then there is a significant likelihood that a specific occupation is in demand.

(x) Approach of the Province of British Columbia: British Columbia's approach is based on the labour market tightness index that uses the following information: 2 years historical EI/Employment ratio; census data; 2 years historical unemployment rate; 5 year projections of employment growth; average unemployment rate; ratio of job openings and employment growth as qualitative information obtained from stakeholder consultation. This analysis is then used to determine a "High Opportunity Occupation List".

5. September 2013: CIC methodology

On 1 February 2014, Ms. Christine Pescarus from ESDC published a research précis. The title was as follows: "*Does Having the Training Required to Work in eligible Occupations of the Ministerial Instructions Guarantee Success on Canada Labour Market*?"[6] In Annex A (page 46), the methodology for determining the eligible occupation list for 2013 is described:

i. CIC used the COPS system to determine which occupation shortages exist.

ii. Provinces and territories were asked to provide their own lists of occupations in demand. Emphasis was placed on provinces that received more skilled workers.

iii. Inventory of current applicants was also taken into consideration. Therefore, if a large number of applicants in a specific occupation requested permanent residence, that occupation would be removed from the list.

iv. Opinions from Health Canada, Industry Canada, and Agriculture Canada.

v. The perspectives of representatives at the Standing Committee on HRSDC and the Status of Persons with Disabilities, on skills gaps in Canada.

vi. The 2010 and 2011 target occupations in the Pan Canadian Framework for Assessment and Recognition of Foreign Qualifications, which identifies the priority occupations for the development of clear and transparent pathways for licensure for internationally educated individuals.

vii. Once a draft list was established, the Minister of CIC made some changes. Changes made by the Minister of CIC and the research used to make these changes are unknown.

Comment:

According to the report, it seems as if ESDC and CIC did not exchange notes and information before the occupation list was finalized.

6 Pescarus, Christine (October 2013). 'Does Being Selected Under the Eligible Occupations Stream of the Ministerial Instructions Guarantee Success on Canada's Labour Market?' *Conference on the Economics of Immigration (University of Ottawa)*. Available: http://socialsciences.uottawa.ca/grei-rgei/eng/documents/Pescarus_presentation.pdf [Accessed 12 May 2015]

Quick Bites

Citizenship Changes: In Force or Yet to Come?

Joanna Carton Mennie, B.A. (Hons.), LL.B.

There has been a tremendous amount of discussion, debate, and concern surrounding the passing of Bill C-24, (the *Strengthening Canadian Citizenship Act*),[1] which introduces significant changes to the citizenship regime in Canada. While the Bill received royal assent and became law on 19 June 2014, a number of important amendments are not yet in force. It is extremely important for citizenship applicants to know what provisions are already operational and which ones have yet to be introduced.

Certain provisions came into force as soon as the Bill received royal assent in June 2014,[2] including fast-tracking applications

1 "Strengthening Canadian Citizenship Act." *Government of Canada, Citizenship and Immigration Canada*. Government of Canada, n.d. Web. 09 Mar. 2015.
2 "House Government Bill – Bill C-24 – Royal Assent (41-2)." *House Government Bill – Bill C-24 – Royal Assent (41-2)*. Parliament of Canada, n.d. Web. 09 Mar. 2015.

for members of the Canadian Armed Forces, implementing a First Generation limit on citizenship of individuals born abroad, and awarding the Minister the authority to decide Discretionary Grants under section 5(4) of the *Citizenship Act*.

On 1 August 2015, a number of other changes were implemented, such as the new decision-making process wherein citizenship officers alone decide most citizenship applications (as opposed to the previous three-tiered model involving a citizenship officer, then a citizenship judge, and then a citizenship officer), as well as a leave requirement to access the Federal Court of Canada. It is also important to note that new rules have also been released, called the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*.

However, many of the most contentious provisions have not yet been rolled out. The new residency requirements, for example, will require that applicants be physically resident in Canada for four of the last six years, including 183 days in Canada for each of these four years. Importantly, time spent in Canada before obtaining permanent residence will not be counted towards citizenship.

Language requirements will also apply to applicants aged 14-64, as opposed to 18-54 as is presently the case. This is significant, as permanent residents who struggle with Canada's two officials languages will have to wait until age 64 to obtain citizenship without having to demonstrate proficiency in English or French. Interpreters will also not be made available during the knowledge test.

Revocation proceedings will also see significant changes, as dual citizens who were involved in armed forces or groups engaged in conflict with Canada may have their Canadian citizenship revoked. The Governor in Council will no longer be the final authority in the revocation process, as the Minister will decide most revocation cases. Some types of cases will still require a declaration from the Federal Court of Canada, but not all. A permanent bar on citizenship will also apply for those convicted of terrorism, treason, and spying offences (depending on the sentence received). Finally, the crackdown on citizenship fraud will continue, as those who obtained citizenship through fraudulent means will face a possible fine of up to $100,000 and/or up to five years in prison.

The changes introduced by Bill C-24 are monumental in scope and complexity. If you are considering your own eligibility to apply for citizenship, it is very important to keep on top of the current state of the law and obtain legal advice!

Section 34(1)(f) of the IRPA — Membership Does Not Require Complicity

Erin Christine Roth, B.A. (Hons.), J.D.

Subsection 34(1)(f) of the *Immigration and Refugee Protection Act* can be used to render an individual inadmissible to Canada for membership in an organization that has acted contrary to subsections 34(1)(a) to (c). To be clear, a foreign national or a permanent resident may be found to be inadmissible to Canada if there are reasonable grounds to believe that he or she is a member of an organization that is involved in espionage, subversion, or terrorism.

What is meant by "membership" was recently re-examined by the Federal Court of Appeal in *Kanagendren v. Canada (M.C.I.)*, 2015 FCA 86, 2015 CarswellNat 815. In *Kanagendren*, the appellant admitted to being a member of the Tamil National Alliance (TNA). The Immigration Division found that membership in the TNA constituted membership in the Liberation Tigers of Tamil Eelam (LTTE), and that Mr. Kanagendren was inadmissible to Canada for being a member of an organization which was involved in terrorism.

The Federal Court of Appeal was asked to answer the following certified question:

> Does *Ezokola v. Canada (M.C.I.)*, 2013 SCC 40, 2013 CarswellNat 2463 change the existing legal test for assessing membership in terrorist organizations, for the purposes of assessing inadmissibility under paragraph 34(1)(f) of the IRPA?

The Supreme Court's decision in *Ezokola* examined membership in the context of section 98 of the IRPA, which looked at Article 1F(a) of the 'United Nations Convention Relating to the Status of Refugees'. Article 1F(a) prevents refugee claimants from being found to be refugees if there are "serious reasons for considering

that [they have] committed a crime against peace, a war crime, or a crime against humanity". The Supreme Court determined that complicity—the actual act of having committed a crime—required that the individual have voluntarily made a significant and knowing contribution to the group's criminal purpose. This is similar to the complicity requirements in criminal law.

The Federal Court in *Joseph v. Canada (M.C.I.)*, 2013 FC 1101, 2013 CarswellNat 3889 adopted the Supreme Court's reasoning for membership and brought it into the assessment of subsection 34(1)(f). Justice O'Reilly concluded:

> [14] In my view, while *Ezokola* dealt with the issue of exclusion from refugee protection, the Court's concern that individuals should not be found complicit in wrongful conduct based merely on their association with a group engaged in international crimes logically extends to the issue of inadmissibility...

This extension of the principles of *Ezokola* to admissibility findings under subsection 34(1)(f) has been reversed by the Federal Court of Appeal's decision in *Kanagendren*. The Court of Appeal concluded that complicity is not required of subsection 34(1)(f) and that findings under this provision differ from the analysis of Article 1F(a), providing:

> [22] In contrast, nothing in paragraph 34(1)(f) requires or contemplates a complicity analysis in the context of membership. Nor does the text of this provision require a "member" to be a "true" member who contributed significantly to the wrongful actions of the group. These concepts cannot be read into the language used by Parliament.

The Federal Court of Appeal's stance is not unexpected and does reflect back on previous jurisprudence, such as the often cited *Poshteh v. Canada (M.C.I.)*, 2005 FCA 85, 2005 CarswellNat 2047. Membership, for the purposes of subsection 34(1)(f), will continue to have an "unrestricted and broad interpretation", such that actual participation in the inadmissible behaviour is not required.

Case Tracker: Cases You Should Know!

Mario D. Bellissimo, LL.B., C.S.

Removal

Case: *Thavachchelvam v. Canada (Minister of Citizenship and Immigration)*
Deciders: Luc Martineau J.
Court: Federal Court
Citation: 2014 CarswellNat 2182, 2014 FC 601, 2014 CF 601, 242 A.C.W.S. (3d) 166
Judgment: 23 June 2014
Docket: IMM-7417-13

8 The PRRA officer's reasoning for discarding the totality of the most contemporary evidence of risk submitted by the applicant is essentially based on the sole opinion of certain Officials of the UK Border Agency [UKBA], who "explained that based on the limited and anonymous information provided by [Human Rights Watch] and [Freedom from Torture], ... did not consider this sufficient evidence to change its policy on Sri Lankan returns." Reference is also made in the UKBA report of December 2012, to an Upper Tribunal decision of the Immigration and Asylum Chamber in the UK which also states that the allegations from Human Rights Watch and Freedom from Torture lacked substance. The Officer also assesses Canada's own National Documentation Package, rejecting the Response to Information Request LKA104245.E (February 12, 2013) again because the allegations that Tamil returnees are arrested or detained are "mostly based on foundations that were proven to be unreliable." Relying on the observations by the UKBA and other UK officials, he states that "I give very little weight to the allegations of detention and torture as reported in LKA104245.E."

9 There is a fundamental problem with the outright dismissal of all relevant information provided by Human Rights Watch, Freedom from Torture and response to Information Request included in Canada's own National Documentation Package for the sole reason that it is "anonymous". These are very credible and internationally recognized organizations. Protecting the sources of their information is central to their mandate of

exposing human rights violations. Peoples' lives could be put at risk if there was personal information which could be used to identify the people who reported abuse, including Tamil returnees and failed refugee claimants, as well as their friends and family members.

25 The applicant's new evidence was highly relevant and could have changed the PRRA officer's conclusion that the applicant does not come within the category of persons being suspected of having links with the LTTE. The new evidence directly relates to the applicant's cousin arrest, charges and conviction. For example, the cousin's detention orders specify that "there are reasons to suspect that he is involved in the commission of the offences under [*the Emergency (Miscellaneous Provisions and Powers) Regulations*, No 1 of 2005] viz having connections with the LTTE International Intelligence Network" and that he is "an active member of the LTTE organization" while the indictment brought before the High Court of the Colombo Judicial Zone, dated February 23, 2012, states that the cousin "planned ... to create or bring about heinous act during the period between 5 July 2006 and 5 December 2006 in Kelaniya ... where on the instruction of Shanmugasundaram Kanthaskaran, a person involved in the LTTE an anti-state movement, he has purchased 10 tractors for the LTTE movement."

26 Moreover, the applicant states that the authorities have a paper-trail linking him to his cousin: namely, he lived with his cousin's father in Colombo from December 2007 until his departure, and he also visited his cousin in prison. The applicant registered himself with the police when he arrived, including stating that he was living with his uncle at the specific address. The applicant visited his cousin twice at the Magazine prison in Colombo. Each visit was allegedly recorded. At the risk of repeating myself, as the documentary evidence above suggests, an individual may be personally at risk as a result of a connection with a family member connected to the LTTE.

27 For these reasons, the present application is allowed. The impugned decision made on September 16, 2013 is set aside and the matter returned for reassessment and redetermination by another Pre-Removal Risk Assessment Officer. Accordingly, the application for judicial review of the removal officer's refusal to defer the removal of the applicant to Sri Lanka has become moot and the Court has dismissed same today (*Thavachchelvam v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2014 FC 602 (F.C.)).

Terrorism

Case: *Khalil v. Canada (Minister of Public Safety and Emergency Preparedness)*
Deciders: David Stratas J.A., Wyman W. Webb J.A., David G. Near J.A.
Court: Federal Court of Appeal
Citation: 2014 CarswellNat 3753, 2014 FCA 213, 245 A.C.W.S. (3d) 397
Judgment: 30 September 2014
Docket: A-36-12

36 In my view, the Minister considered both the positive and negative factors highlighted in the CBSA assessment and ultimately accepted the CBSA recommendation. It may be that a different decision could have been reached based on the facts of this case but this does not make the decision unreasonable. As the Supreme Court stated in *Agraira SCC*, a court reviewing the reasonableness of a minister's exercise of discretion is not entitled to engage in a new weighing process [...]. Given that the Minister considered and weighed all the relevant factors as he saw fit, it is not open to the Court to set the decision aside on the basis that it is unreasonable.

(*Agraira SCC* at paragraph 91)

38 As previously noted, the authority to grant ministerial relief pursuant to subsection 34(2) of the IRPA rests solely with the Minister of Public Safety, but where the Minister agrees with the CBSA recommendation, the recommendation can form the reasons for the Minister's decision: see *Sketchley* at paragraphs 37 to 38 and *Newfoundland Nurses* at paragraph 15.

42 Indeed, by requiring the Minister to consider the various factors concerning Ms. Haj Khalil, subsection 34(2) of the IRPA accommodates whatever rights to liberty and security of the person she may have: see *Serrano Lemus v. Canada (Minister of Citizenship and Immigration)*, 2014 FCA 114 (F.C.A.) at paragraph 16. It is also telling that in *Agraira SCC*, the Supreme Court of Canada did not identify any possible Charter concerns with respect to the ministerial relief process provided for in subsection 34(2) of the IRPA.

44 Whether a reviewing court, here the Federal Court of Appeal, will entertain a new issue on judicial review is a matter for discretion. The Supreme Court has said generally this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised before the administrative decision-maker: *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 (S.C.C.) at paragraph 23 (*Alberta Teachers*). One of the key reasons for this rule is the need for a full evidentiary record and the evidentiary record is constructed by the administrative decision-maker: *Alberta Teachers* at paragraph 26. In this case, the record before the Minister has nothing to do with paragraph 34(1)(*f*). Of course, compounding the situation for Ms. Haj Khalil is the fact that the matter has now progressed to an appeal from a judicial review — the matter is now even more remote from the original administrative decision-maker. Finally, the decision in *Ezokola* does not so radically change the legal environment such that an exercise of discretion in Ms. Haj Khalil's favour would be warranted. For these reasons, the Court exercised its discretion against entertaining the paragraph 34(1)(*f*) issue in this case.

Work Permits

Case: *Portillo v. Canada (Minister of Citizenship and Immigration)*
Deciders: James Russell J.
Court: Federal Court
Citation: 2014 CarswellNat 3476, 2014 FC 866
Judgment: 12 September 2014
Docket: IMM-5004-13, IMM-5012-13, IMM-5014-13, IMM-5016-13

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.

Refugee

Case: *Johnson v. Canada (Minister of Citizenship and Immigration)*
Deciders: Anne L. Mactavish J.
Court: Federal Court
Citation: 2014 CarswellNat 3519, 2014 FC 868
Judgment: 15 September 2014
Docket: IMM-3702-13

33 This is not such a case. The law with respect to complicity has evolved significantly since the immigration officer decided that Mr. Johnson was inadmissible to Canada, and any re-determination of the question of Mr. Johnson's admissibility would thus have to be carried out in accordance with the law as it now stands.

34 As a result of the Supreme Court of Canada's decision in *Ezokola c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678 (S.C.C.), the test for complicity is now considerably stricter than it was under the *Ramirez* test, as it eliminates the possibility of "complicity by association". It would be more consistent with the scheme envisaged by Parliament to return this matter to the expert decision-maker entrusted with the responsibility for making admissibility determinations to reconsider the question of Mr. Johnson's admissibility to Canada based upon the current test for complicity.

Case: *Hernandez Febles v. Canada (Minister of Citizenship and Immigration)*
Decider: McLachlin C.J.C., Lebel J., Abella J., Rothstein J., Cromwell J., Moldaver J., Wagner J.
Court: Supreme Court of Canada
Citation: 2014 CarswellNat 4175, 2014 SCC 68
Judgment: 30 October 2014
Docket: 35215

132 In my view, depending on the seriousness of the crime, if an individual is believed to have committed a serious non-political crime, the purpose of Article 1F(b) can be met where the individual's circumstances reflect a sufficient degree of rehabilitation or expiation that the claimant ought not to be disqualified from the humanitarian protection of the *Refugee Convention*. The completion of a sentence, along with factors such as the passage of time since the commission of the offence, the age at which the crime was committed, and the individual's rehabilitative conduct, will all be relevant. On the other hand, individuals who have committed such serious crimes that they must be considered undeserving of the status of being a refugee would be excluded.

133 Support for this interpretation comes from the approach taken by the UNHCR and by foreign courts in Belgium and the United Kingdom, which have emphasized that those who have committed particularly serious crimes are excluded under the *Refugee Convention* on the basis that they are undeserving of the status of a refugee. This approach also accords with the intention of the signatories to the *Refugee Convention* to protect the integrity and viability of the international system of protection for refugees by limiting the obligations of the contracting parties towards individuals who have committed very serious crimes.

134 In concluding that Mr. Febles was excluded from the *Refugee Convention* on the basis of Article 1F(b), the Board considered "only the crime committed in 1984, for which there is more information" and found that Mr. Febles had committed a "serious non-political crime" (para. 22). It observed that Mr. Febles had completed the sentence imposed for the offence committed in 1984, and that "it might appear unfair to the claimant that, although he served his sentence and took the second chance that life was offering him 17 years ago and chose to follow a straighter path, the crimes he committed many years ago are coming back to haunt him" (para. 24). The question it did not determine is whether this offence was so serious that Mr. Febles must be considered undeserving of the status of a refugee.

135 Mr. Febles expressed remorse immediately after the commission of the offence and turned himself in to the police. He pleaded guilty and served his sentence for his criminal conduct. He also admitted that he was suffering from problems with alcohol at the time of the offence. While it is clear that the criminal conduct was serious, what has yet to be determined is whether the crime is so serious that Mr. Febles' personal circumstances since serving his sentence in 1984 ought to be disregarded in considering whether he is entitled to refugee status.

136 I would therefore allow the appeal and return the matter to the Immigration and Refugee Board for redetermination in accordance with these reasons.

Case: *Cuevas Mendoza v. Canada (Minister of Citizenship and Immigration)*
Decider: Roger T Hughes J
Court: Federal Court
Citation: 2014 CarswellNat 3007, 2014 FC 715
Judgment: 17 July 2014
Docket: IMM-3980-13

11 In considering credibility in these contexts the Member should have been mindful of two things. First, as stated by this Court in *Valtchev v. Canada (Minister of Citizenship & Immigration)*, [2001] F.C.J. No. 1131 (Fed. T.D.) at paragraph 7 plausibility, i.e. credibility, findings should only be made in the clearest of cases. The second is that the Member, at the outset of the hearing, announced that credibility would not be an issue unless he raised it at the hearing. There was no credibility issues raised at the hearing. I repeat what the Member said at the outset of the hearing:

> PRESIDING MEMBER: Okay. This hearing is a return from the Federal Court. The Court found fault with the Board's past decision and sent the hearing back to the Board for another hearing.
>
> Counsel, we're going to raise the same issues essentially that were raised in the last hearing. And we'll have a discussion on that before we proceed with the rest of the hearing.

Credibility was defined at the last hearing. The member didn't have any credibility concerns, or didn't express any credibility concerns. Credibility is always an issue in refugee hearings. But I will accept the finding of the past member, unless I have my own concerns that are raised in this hearing.

COUNSEL: I will note they were found credible at their first hearing as well.

PRESIDING MEMBER: Okay.

COUNSEL: There was no issues at either hearing.

PRESIDING MEMBER: Okay. Okay so given that, we won't have to cover again the material aspects of their testimony.

Residency

Case: *Durve v. Canada (Minister of Citizenship and Immigration)*
Deciders: Catherine M. Kane J.
Court: Federal Court
Citation: 2014 CarswellNat 3544, 2014 FC 874
Judgment: 15 September 2014
Docket: IMM-1332-13

156 As noted above, "functioning entity" or "functional entity" has no clear meaning and likely means "operating entity/business" and therefore does not differ from the notion of ongoing operation which the Board reasonably interpreted as continuing activities. The argument for a different or broader interpretation is circuitous. Moreover, the Board found that Mr Durve had not established what his business did in Canada — i.e. there was no evidence to establish it was either a functioning entity or an ongoing operation *in Canada*.

157 The second question would only be dispositive if the applicant had established, first, that he had a Canadian business and, second, that he had evidence to support his full-time work. This is a factual determination and the Board found that he could not so establish. Whether the work was paid or unpaid was not the issue, he could not establish what work was done. As noted above, some unpaid work may be considered as full-time work for the Canadian business if there is evidence to establish that it is done in furtherance of future paid work or is part of the business plan, and the amount of unpaid work is not disproportionate to the paid work.

Incompetence of Counsel

Case: *Guadron v. Canada (Minister of Citizenship and Immigration)*
Deciders: Alan Diner J.
Court: Federal Court
Citation: 2014 CarswellNat 4857, 2014 FC 1092
Judgment: 19 November 2014
Docket: IMM-1484-13

23 Having established that the fairness of financial consideration is not within the ambit of the reviewing court's purview, what is for this Court to pronounce upon is whether any or all of the four elements substantially absent from evidence were (i) exceptional, and (ii) resulted in a miscarriage of justice, per *B. (G.D.)*, above. This inquiry necessarily includes whether there were any missed opportunities to update CIC in the months leading up to the H&C refusal.

27 I disagree. It was incumbent upon the legal representative, after having accepted the retainer, to apprise CIC as fully as possible of all key factual elements relevant to this H&C application.

28 The Court makes this determination in the absence of deciding on any of the credibility concerns asserted by the Intervener *vis-a-vis* the Applicant's failures to furnish evidence on these points: I find no need to adjudicate on the "he said — she said" said aspects of this unfortunate dispute.

29 Rather, I find that as the duly appointed legal representative under the Act, it was the representative's responsibility to make reasonable attempts to seek out crucial information required for the Applicant to overcome the significant hurdles in obtaining a highly discretionary and exceptional H&C remedy. It is not good enough to state that the Applicant (or her family) did not volunteer it. That approach undermines the reason for hiring a licensed representative, be it a lawyer, or a consultant in this case. To find otherwise would posit the question as to why one would bother to hire a professional in the first place.

33 However, this explanation does not pass muster because, firstly, the application letter mentions one grandchild in Canada, and secondly, making inquiries about the other grandchildren in the six months after the H&C submission would have shown that they were now all Convention refugees in Canada.

35 Finally, no documentation was requested by the Intervener from the Applicant concerning medical information about her physical ailments. While a psychological assessment was put before the officer, as a woman who suffers from asthma and cardiovascular issues for which she takes daily medication, these pre-existing conditions could very well have been a factor in the determination of whether the hardship the Applicant faced living by herself in El Salvador was "unusual, undeserved or disproportionate". After all, most likely way she would see her family in the future was based on her ability to obtain a Supervisa (due to the limitations on the parental and grandparents' class that were known to the Intervener). No medical evidence, per se (i.e. from a doctor) was tendered, and nothing was mentioned about the issue in the H&C submission.

36 Finally, the Intervener suggests that these kinds of omissions are revealed only with the benefit of hindsight. Again, I disagree. Each of the four omissions, severally, had the potential to change the outcome, and jointly, their inclusion would have resulted, in my view, in the reasonable probability of a different results just as the cumulative effect of the exceptional circumstances had in the jurisprudence I have referenced above.

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