

Federal Court



Cour fédérale

Date: 20150514

Docket: IMM-283-14

Citation: 2015 FC 632

Ottawa, Ontario, May 14, 2015

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

NARESH RAMNANAN

Applicant

And

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA or the Act] challenging a decision by an immigration officer [the Officer] refusing the applicant's request for a Temporary Resident Permit [TRP] pursuant to section 24 of the Act.

[2] The applicant is seeking an order quashing the Officer's decision and sending the matter back for reconsideration by a different officer.

II. Background

[1] The applicant, Mr. Naresh Ramnanan, is a citizen of Trinidad and Tobago. He entered Canada in February 1988 seeking refugee protection and became a permanent resident on December 10, 1992 through the Refugee Backlog Clearance Program.

[2] A removal order was issued against the applicant on January 27, 2000 because he was found to be criminally inadmissible. The applicant appealed the order to the Immigration Appeal Division [IAD], but his appeal was denied on December 12, 2001. He brought a motion to re-open the IAD appeal in June 2002, which was initially denied. He brought a judicial review of that decision, which was allowed on consent and the IAD re-opened the appeal.

[3] In November 2004, the IAD granted him a stay of removal subject to certain terms and conditions, and the appeal was to be reconsidered in May 2007. The applicant subsequently breached the condition that he not commit any criminal offences when he was convicted of several offences on October 27, 2005 (possession of a Schedule I substance contrary to subsection 4(3) of the *Controlled Drugs and Substances Act*, SC 1996, c 19, possession of proceeds of property obtained by crime, unauthorized possession of a prohibited and restricted weapon, and possession of proceeds of crime). He was sentenced to 90 days imprisonment, served concurrently, and 12 months of probation. He was also subject to a mandatory prohibition

order pursuant to section 109 of the *Criminal Code*, RSC 1985, c C-46. The applicant was released from custody on December 25, 2005.

[4] As a result of his criminal convictions, the applicant was stripped of his permanent resident status by operation of law on March 28, 2006. The IAD cancelled his stay of removal and terminated his appeal in April 2007 and this decision was upheld by this Court on judicial review (*Ramnanan v Canada (Citizenship and Immigration)*, 2008 FC 404, 325 FTR 248).

[5] The applicant applied for an exemption to the permanent residence requirements on humanitarian and compassionate grounds [H&C] and for a Pre-Removal Risk Assessment [PRRA]. These applications were refused in May and June 2010, respectively.

[6] His criminal record shows 17 criminal convictions related to 10 separate events between November 1996 and October 2006, six of which were convictions for a failure to comply with a recognizance. On January 1, 2012, the applicant was arrested and charged with several offences which were later withdrawn. He entered into a peace bond in January 2012.

[7] The applicant then applied for a TRP on June 10, 2013 with the primary goal of remaining in Canada to continue to provide care for his two youngest children. An interim stay of removal was granted by Justice Heneghan of this Court on June 18, 2013. He was later scheduled for removal on March 17, 2014 and sought a stay of removal, which was granted by Justice Russell of this Court on March 13, 2014.

[8] The applicant has two children from his first marriage (Tricia and Nicolas) and two children from a common-law relationship with Ms. Terri Brown (Cheyenne and Naresh Jr.). At the time of the TRP application, Tricia was 26 years old, Nicolas was 19, Cheyenne was 17, and Naresh Jr. was 15. Both Cheyenne and Naresh Jr. were living with the applicant full-time and they were fully dependent on him. Tricia and Nicolas sometimes stayed at his home. He also has one step-daughter (Dzsenifer) with his second wife, Ms. Krisztina Ramnanan, both of whom are currently living in England.

[9] The applicant has been the primary caregiver for Cheyenne and Naresh Jr. because their mother suffered from drug addiction and her current whereabouts are unknown. The Children's Aid Society [CAS] has been involved in their lives from a very early age – Cheyenne was taken into foster care in or about 1998 and Naresh Jr. was taken into foster care at birth after traces of cocaine were found in his mother's urine. The applicant sought sole custody and has cared for Cheyenne and Naresh Jr. since 2001, when they were aged six and three.

[10] Both Cheyenne and Naresh Jr. have had their own share of difficulties. Cheyenne was diagnosed with Fetal Alcohol Syndrome Disorder [FASD] and at one point dropped out of school. In May 2010 she ran away from home and CAS briefly took her into foster care, but she ran away and returned to the applicant's home. On March 24, 2012, at the age of 16, Cheyenne gave birth to a son, Luis. She is a single mother and does not have sole custody, but there is a family court order in place which gives her access to Luis two days per week on the condition that this access is under the applicant's supervision. Luis currently lives with his paternal

grandmother. This arrangement was agreed to by CAS since it had concerns about domestic violence between Cheyenne and Luis' father and her ability to care for Luis.

[11] Naresh Jr. was born with a cocaine addiction, has a learning disability, and has suffered from depression. He is in a special education program. Naresh Jr. has faced criminal matters in the past. At the time of the applicant's scheduled removal in June 2013, he had a trial scheduled for July 2013, but that charge was dismissed at trial. At the time of this application, Naresh Jr. had recently been charged with robbery following an incident at school. He was released on a Promise to Appear and the applicant had been advised by the principal that there was not enough evidence to expel Naresh Jr. from school, unlike the other accused students.

[12] The applicant indicated in his TRP application that he was working with Naresh Jr.'s teachers, medical professionals and CAS to ensure that he had a stable, supportive environment to aid in his learning and would receive the best care and help available. Arrangements were being made to test him for FASD. A letter from a CAS family service worker, dated November 28, 2013, stated that Naresh Jr. should continue to reside with the applicant in Canada since he requires additional supports at school which may not be available in Trinidad and Tobago and he responds well to the applicant's parenting and his current school. The letter also stated that it would be very difficult for Naresh Jr. to become accustomed to a new culture and new societal norms without it having an impact on his emotional well-being. A copy of the Naresh Jr.'s Individual Education Plan for the current school year was also submitted to the Officer.

[13] Cheyenne is over the age of 18, but CAS continues to be involved in her and her son's lives. She submitted a Statutory Declaration in support of the TRP application noting that the applicant has been her primary caregiver for most of her life and that she still relies on him for moral and financial support. She also confirmed that CAS requires that her visits with Luis involve the applicant and that in order for her to seek full custody and access in the future; she would need her father's help and assistance. She stated that she would not have access to her son if the applicant was deported.

[14] The applicant stated in his TRP application that he was the only person able to help and support Cheyenne, Luis, and Naresh Jr. and that they would have nowhere to go if he is removed from Canada. They also do not wish to go with him to Trinidad and Tobago. The applicant stated that in Trinidad and Tobago, there would be no special education programs for Naresh Jr. and no support systems available to Cheyenne. His position is that, as Canadian citizens, his children have a right to the care and resources available in Canada and they would have no way of accessing those resources if they had to go back to Trinidad and Tobago with him.

[15] The applicant submitted a forensic psychological report from Dr. Celeste Thirlwell, which stated that both Cheyenne and Naresh Jr. have developmental and psychosocial issues and are particularly vulnerable to any destabilising changes in their lives. Dr. Thirlwell found that the applicant's removal would seriously undermine the gains made by the children and they would suffer "irreversible psychological and emotional damage," regardless of whether they stay in Canada or go with him. She also found that the applicant has developed severe depression and complex Post Traumatic Stress Disorder due to the cumulative effects of his uncertain

immigration statues and other legal issues. A psychological assessment of Cheyenne by Dr. Daniel Fitzgerald was also submitted for consideration.

III. Impugned Decision

[16] The TRP application was refused in a decision letter dated January 13, 2014. The letter summarized the evidence that had been submitted and stated that the Officer had considered the time the applicant had spent in Canada, the effect of removing him to Trinidad, and the best interests of his children and grandchild. The Officer concluded that these factors did not outweigh the severity of the applicant's criminal history in Canada.

[17] The Officer's notes provide a more fulsome explanation of his reasoning. With regard to Cheyenne's access to Luis, the Officer found that the applicant and Cheyenne should have made alternate arrangements through the courts to deal with the issue of his impending removal (e.g. naming alternate parties to act as supervisor during her visits). The Officer held that this is a serious legal matter and "should not be used as a shield to impede immigration proceedings." He noted that Cheyenne is facing assault charges against Luis' father, but she was taking steps to correct some of her behaviours which will help her as she raises Luis.

[18] The Officer also considered the psychological assessments of Cheyenne and Naresh Jr. and that the fact that they both have FASD. He stated that "their medical conditions are known and they appear to be on the path of dealing with this issue" and that it was the family's decision whether they would accompany the applicant to Trinidad and Tobago or remain in Canada.

[19] The Officer then found that the applicant has a “very long and interesting criminal history in Canada” and that he was “a “one-man crime wave,” having accrued 22 convictions in a short period of time.” The Officer noted that the applicant spent time in prison and held that his convictions could have resulted in up to 10 years of imprisonment. Finally, the Officer held that the applicant had already been given an opportunity to show that he could change his pattern of criminal behaviour, but had violated the conditions of his stay of removal by reoffending.

IV. Issues

[20] The applicant has raised a number of issues in his application:

1. Did the Officer err in failing to actually assess the relevant TRP factors and apply the requisite test, namely whether there are “compelling reasons” for granting the TRP?
2. Did the Officer fail to consider the best interests of the children or fail to be at least alert, attentive and sensitive to their interests?
3. Did the Officer err by ignoring evidence, misinterpreting evidence or making factual errors in considering the evidence?
4. Did the Officer breach procedural fairness by failing to provide adequate reasons?
5. Did the Officer breach procedural fairness by failing to disclose the source of his assertion that the applicant appeared to be a “one man crime wave”?

6. Did the Officer breach procedural fairness by failing to call the applicant for a personal interview before rendering a decision?

[21] This case turns on the Officer's assessment of the best interests of the applicant's children and the associated evidence, so it is not necessary for the Court to consider each of the issues raised by the applicant.

V. Standard of Review

[22] The Officer's decision to issue a TRP under subsection 24(1) of the Act is a highly discretionary one, so the reasonableness standard of review applies (*Evans v Canada (Citizenship and Immigration)*, 2015 FC 259 at para 26 [*Evans*], *Shabdeen v Canada (Citizenship and Immigration)*, 2014 FC 303, 24 Imm LR (4th) 291 [*Shabdeen*], *Alvarez v Canada (Citizenship and Immigration)*, 2011 FC 667 at para 18, 203 ACWS (3d) 380 [*Alvarez*], *Ali v Canada (Citizenship and Immigration)*, 2008 FC 784 at para 9, 73 Imm LR (3d) 258).

VI. Statutory Provisions

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

*Immigration and Refugee
Protection Act*, SC 2001, c 27

*Loi sur l'immigration et la
protection des réfugiés*, LC
2001, ch 27

24. (1) A foreign national

24. (1) Devient résident

<p>who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.</p> <p>...</p>	<p>temporaire l'étranger, dont l'agent estime qu'il est interdit de territoire ou ne se conforme pas à la présente loi, à qui il délivre, s'il estime que les circonstances le justifient, un permis de séjour temporaire — titre révocable en tout temps.</p> <p>...</p>
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<p>(3) In applying subsection (1), the officer shall act in accordance with any instructions that the Minister may make.</p>	<p>(3) L'agent est tenu de se conformer aux instructions que le ministre peut donner pour l'application du paragraphe (1).</p>
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[24] The following provisions of the Citizenship and Immigration Canada Inland Processing Manual IP-1 [the Manual] are applicable in these proceedings:

5.1. Purpose of temporary resident permits

Normally, persons who do not meet the requirements of the Immigration and Refugee Protection Act are refused permanent resident or temporary resident visas abroad, denied entry at a port of entry, or refused processing within Canada. However, in some cases, there may be compelling reasons for an officer to issue a temporary resident permit to allow a person who does not meet the requirements of the Act to enter or remain in Canada.

...

5.9. Interviews

Officers may interview the client as part of the enforcement, selection or counselling process. Interviews provide officers with information regarding possible inadmissibility and violations of the Act. Officers may also use interviews to assess credibility, confirm facts related to need and/or risk and communicate concerns to the client.

Officers do not have to interview all applicants for temporary resident permits. If an officer is sure the applicant is eligible for a society, an interview may not serve any useful purpose. If the

officer is uncertain about either of the last two factors, an interview should be held.

...

12. Procedure: Decision criteria: Temporary entry

To determine whether favourable consideration is warranted to overcome inadmissibility, officers must weigh the need and risk factors in each case.

12.1. Needs assessment

An inadmissible person's need to enter or remain in Canada must be compelling and sufficient enough to overcome the health or safety risks to Canadian society. The degree of need is relative to the type of case.

The following includes points and examples that are **not** exhaustive, but they illustrate the scope and spirit in which discretion to issue a permit is to be applied.

Officers must consider:

- the factors that make the person's presence in Canada necessary (e.g., family ties, job qualifications, economic contribution, temporary attendance at an event);
- the intention of the legislation (e.g., protecting public health or the health care system).

The assessment may involve:

- the essential purpose of the person's presence in Canada;
- the type/class of application and pertinent family composition, both in the home country and in Canada;
- if medical treatment is involved, whether or not the treatment is reasonably available in Canada or elsewhere (comments on the relative costs/accessibility may be helpful), and anticipated effectiveness of treatment;
- the tangible or intangible benefits which may accrue to the person concerned and to others; and
- the identity of the sponsor (in a foreign national case) or host or employer (in a temporary resident case).

...

[Emphasis added.]

VII. Analysis

[25] Although the Court recognizes the wide discretion of the Officer in weighing the applicant's criminal record with the best interests of his children and grandchild, I nevertheless conclude that his very brief reasons were insufficient regarding his analysis of the adverse impact on the children resulting from the applicant's removal to Trinidad.

[26] In particular, I conclude that the Officer was required to provide some explanation as to how he could conclude that the children "appear to be on the path of dealing with this issue," having only specifically identified that Cheyenne and Naresh Jr. have FASD. The Officer did not mention or deal with any of the other issues facing these children, apart from the issue of Cheyenne's access to Luis.

[27] I would be prepared to overlook the applicant's arguments based on the forensic psychologist's report, meaning a report requested by a lawyer for litigation purposes, particularly since I am of the opinion that the applicant's forensic expert took on the role of advocating on behalf of Naresh Jr. (see generally *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23 at para 49: "... an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court.").

[28] Moreover, as I have previously commented at paragraphs 37 to 42 of *Czesak v Canada (Citizenship and Immigration)*, 2013 FC 1149, 235 ACWS (3d) 1054 circumspection is required

when weighing the probative value of forensic expert reports. Trial courts and those required to assess the probative value of opinions of experts retained by counsel have recognized the potential for erroneous decisions unless the reliability of the opinions has been subjected to extensive adversarial challenge and supported by underlying neutral third-party documentation.

[29] These comments aside, the Court's principal concern in this case relates to the Officer's failure to comment on the issues raised by the CAS letter signed by the Family Service Worker Ms. Andrea Torchia and her supervisor, Ms. Christine Reposo. That letter stressed the importance of the applicant's role in Naresh Jr.'s progress to overcome his psychological challenges, concluding that he will "most likely require ongoing supports from community services and his father, Mr. Ramnanan, throughout his teenage years and into adulthood." CAS employees are specialists in identifying children at risk and assisting them through various programs and by facilitating recourse to relevant experts. Their opinions, in the form of assessments and recommendations for interventions, are tested on a daily basis in the courts.

[30] The Officer is presumed to have considered all the evidence before him and this presumption will only be rebutted where the evidence not discussed has high probative value and relates to a core issue of the claim (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (QL) (FCA), *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at paras 16-17, 83 ACWS (3d) 264 (FC)).

[31] Nevertheless, given the expertise of CAS employees in identifying and addressing children's needs and the independent nature of this evidence, its opinion on the best interests of a

child has a presumptively high probative value. Therefore, I find that it was not reasonable for the Officer to fail to discuss this evidence, particularly the role of the applicant in the child's improving situation.

VIII. Conclusion

[32] In conclusion, I find that the Officer's reasons lack transparency in stating only that the applicant's children appear to be on the path of dealing with their issues, without any indication that he was alert to the applicant's apparent significant role in their improving circumstances as indicated by independent expert evidence. This oversight constitutes a reviewable error requiring the Court's intervention, such that the application must be allowed and the matter returned to be heard by another officer.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed and the matter is to be re-determined by another officer. No questions were suggested for certification and none are certified.

"Peter Annis"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-283-14

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PLACE OF HEARING: TORONTO, ONTARIO

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

DATED: MAY 14

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