Federal Court Cour fédérale

Date: 20150717

Docket: IMM-4821-14

Citation: 2015 FC 880

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, July 17, 2015

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

WILFRID GUY CÉSAR NGUESSO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision rendered on April 14, 2014, by the Acting Associate Assistant Deputy Minister (the Deputy Minister), in which he refused an application for a temporary resident permit (TRP) by Wilfrid Guy César Nguesso (the applicant).

I. Background

[2] The applicant is a citizen of the Republic of the Congo. He has been married to a Canadian citizen since 1999, and the couple has six children, all of whom are Canadian citizens. During the relevant period, four of the six children lived in Canada with their mother. The applicant is also a resident of France, where he holds a residency permit that is valid until 2022.

[3] On December 27, 2006, the applicant filed an application for permanent residence under the family class, including a sponsorship application by his wife, with the Immigration Section of the Canadian Embassy in Paris (the Immigration Section). After a long process that I do not need to describe in detail for the purposes of this decision, the applicant's permanent residence application was refused by an immigration officer on December 20, 2013. At the end of that decision, the applicant was found to be inadmissible on grounds of organized criminality under paragraph 37(1)(*a*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), and his permanent residence application was refused.

[4] Between 2003 and 2014, the applicant obtained several multiple-entry temporary resident visas (TRVs). However, following the determination of the applicant's inadmissibility and the refusal of his permanent residence application, his TRV, which was valid until September 29, 2014, was cancelled.

II. TRP application

[5] On February 20, 2014, the applicant applied for a TRP under section 24 of the IRPA to visit his family in Canada despite his inadmissibility.

[6] The issuance of a TRP is governed by subsection 24(1) of the IRPA, which reads as follows:

24. (1) A foreign national 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.	24. (1) Devient résident 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.

[7] In support of his application, the applicant filed several affidavits, including one sworn by his wife. The application was primarily based on the special needs of the applicant's wife and their two youngest children and the absence of risk posed by the applicant to Canadian citizens.

[8] In her affidavit, the applicant's wife, who is a pastor and student at Acadia University in evangelical theology, declared that the applicant had intended to visit them from January 18, 2014, until April 2015, and when his permanent residence application was refused, she had to cancel her winter semester. She also stated that she suffered from [TRANSLATION] "thyroid", indicating that she took medication daily and had to avoid stress because of her condition. The

applicant's wife filed a note from her physician in which he affirmed that she was undergoing treatment for a type of hypothyroidism.

[9] The applicant's wife also stated that her husband's presence and assistance were necessary for both her children and herself. She indicated that the two youngest children, twins, particularly needed their father's support and authority, since one of them has functional challenges requiring occupational therapy, while the other is agitated and sometimes aggressive, requiring the services of a child psychiatrist. The applicant filed an occupational therapy evaluation report for one of the children in which the occupational therapist noted fine motor difficulties and recommended occupational therapy to develop the child's motor skills and coordination. With respect to the second child, the applicant filed correspondence with school teachers indicating that his conduct in the classroom was disturbing and recommending psychological counselling. At the time the applicant's wife filed the affidavit, they were waiting for an appointment with a child psychiatrist.

[10] The applicant also filed affidavits sworn by his wife's sister and cousin. They stated that the twins were quite hyperactive and that only the applicant was able to calm them down.

[11] The applicant also filed a certificate from the Congolese police attesting that he had no criminal charges or convictions. He also stated in his TRP application that his previous stays in Canada had always been lawful and that he posed no risk to the health and safety of Canadians.

III. Processing of application and decision

A. *Processing of TRP application*

[12] The TRP application was initially handled by Rénald Gilbert, a Minister-Counsellor with the Immigration Section.

[13] On March 13, 2014, Mr. Gilbert sent an email to the Case Management Branch in Ottawa in which he summarized the applicant's file and recommended that the TRP application be refused. The email was accompanied by various documents, including the decision of December 20, 2013, refusing the applicant's permanent residence application and the notes taken by the immigration officer during the interview with the applicant on September 25, 2012. The content of this email was entered into the Global Case Management System (GCMS notes) on March 13, 2014.

[14] The file was then reviewed by an officer from the Case Management Branch, who prepared a report dated April 11, 2014, that contained a recommendation for the Deputy Minister. The Case Management Branch recommended the refusal of the applicant's TRP application on the ground that the humanitarian and compassionate considerations, particularly those involving the best interests of the children, did not constitute sufficient and compelling reasons to allow the applicant to enter Canada.

[15] The Case Management Branch considered the fact that the applicant alleged that his presence in Canada was indispensible to his family life, mainly because of the difficulties of his

wife and two youngest children, but no medical, psychological or other evidence was filed in support of these allegations. It also noted that the applicant had not lived with his wife and their four children for about eight years and that he had not submitted any evidence of his continued involvement with the family when outside of Canada. It concluded that it was unlikely that the applicant's presence was indispensible to his family life.

[16] The Case Management Branch also found nothing in the file to indicate that it would be impossible for the applicant's four children residing in Canada to visit the applicant in France. In response to the applicant's argument that he would not be able to see his children outside of school vacations, it noted that he had provided no justification in support of this. The Case Management Branch recognized that it was more difficult for young children to travel, but not impossible, and that a TRP was justified by exceptional circumstances, not by convenience.

[17] The Case Management Branch concluded that a review of the circumstances did not support a finding that there were sufficient and compelling reasons to authorize the issuance of a TRP. It added that refusing to issue a TRP in the circumstances was consistent with the IRPA's objective of promoting international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminal or security risks, as set out in paragraph 3(1)(*i*).

[18] The last section of the report contains two statements for the decision-maker. The Deputy Minister checked the box next to the following statement: [TRANSLATION] "I have reviewed all of

the documents before me and decided not to issue a temporary permit to Mr. Nguesso." The Deputy Minister signed the recommendation report on April 14, 2014.

B. *Impugned decision*

[19] In a brief letter, the Deputy Minister informed the applicant that his TRP application had been refused because the grounds were inadequate.

[20] The GCMS contains the notes entered by the Deputy Minister on April 16, 2014, which set out his reasons.

[21] The Deputy Minister emphasized at the outset that the issuance of a TRP is a discretionary tool that allows a person to enter Canada who is otherwise inadmissible and that it is used in exceptional circumstances. He noted that the application was based entirely on the best interests of the applicant's children.

[22] He indicated that the applicant had cited medical and psychological reasons involving his wife and children, but he judged that the applicant had provided no information or independent assessments in support of his allegations. He added that nothing indicated that the problems at issue were related to separation from the father.

[23] The Deputy Minister added that living in two different countries seemed to be the family's choice and that the applicant seemed to travel frequently.

[24] The Deputy Minister raised the applicant's assertion that if he did not obtain the TRP, he would be limited to seeing his children during school vacations. He found that even if it could be desirable to preserve the traditional family unit, more and more families are living in different countries and this model seems to have been chosen by the applicant's family. He found that the applicant's family could go visit him in France, that flights between Quebec and France were frequent and that the applicant seemed to have the means to allow his family to travel to France regularly. He added that the applicant's family would find itself in a situation similar to that experienced by many families and that the refusal to issue a TRP would not result in the family's permanent or definitive separation.

[25] He concluded that in light of the serious allegations against the applicant involving his inadmissibility, the exceptional nature of the issuance and the thorough review of the file, including a careful review of the recommendation that had been submitted to him (dated April 11, 2014), he considered that the best interests of the children did not overcome the applicant's inadmissibility.

C. *Disclosure of reasons for decision*

[26] The application for leave and judicial review of this decision was filed on June 13, 2014, and it included an application under Rule 9 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, to obtain the reasons for the decision.

[27] On June 26, 2014, an immigration officer sent the applicant a copy of the notice of the Deputy Minister's decision, with which she enclosed the GCMS notes and indicated that these

notes formed part of the reasons for the decision. The excerpt from the GCMS contained the notes of April 16, 2014, reporting the reasons for the Deputy Minister's decision and the email of March 13, 2014, sent by Mr. Gilbert to the Case Management Branch. However, the Case Management Branch's recommendation of April 11, 2014, which the Deputy Minister had signed, was not among the documents sent to the applicant. This recommendation was sent to the applicant on July 21, 2014, after his counsel pushed to obtain it.

IV. Issues

[28] This application for judicial review raises the following issues:

1. Was procedural fairness observed?
2. Did the decision-maker make errors of law that warrant this Court's intervention?
3. Was the Deputy Minister's decision reasonable?

V. Applicable standards of review

[29] The standard of review applicable to cases of procedural fairness is correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339; *Mission Institute v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502). The question in this case is not so much whether the decision is correct as whether the process followed by the decision-maker was fair (*Majdalani v Canada (Minister of Citizenship and Immigration)*, 2015 FC 294 at para 15, [2015] FCJ No 459; *Krishnamoorthy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1342 at para 13, [2011] FCJ No 1643 [*Krishnamoorthy*]; *Pusat v Canada (Minister of Citizenship and Immigration)*, 2011 FC 428 at para 14, [2011] FCJ No 541).

[30] As for the Deputy Minister's interpretation of section 24 of the IRPA, I am of the view that it should be reviewed on a standard of reasonableness.

[31] The Deputy Minister had to interpret the phrase "if an officer is of the opinion that it is justified in the circumstances" found at subsection 24(1) of the IRPA, a provision of his own statute, with which he has particular familiarity. In *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 49-50, [2013] 2 SCR 559 and *Canadian National Railway Co. v Canada (Attorney General)*, 2014 SCC 40 at paras 55-62, [2014] 2 SCR 135, the Supreme Court applied the presumption that the standard of reasonableness applies to questions involving the interpretation of the decision-maker's own statute or statutes closely connected to its functions in non-jurisdictional contexts. In this case, there is no indication that the presumption should be ousted. The Deputy Minister had to render a highly discretionary decision, which involved interpreting a provision with which he is deeply familiar.

[32] The Deputy Minister's assessment of the circumstances raised by the applicant in support of his TRP application is reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 51, [2008] 1 SCR 190 [*Dunsmuir*]). It is well established that issuing a temporary resident permit is a highly discretionary act that justifies the application of the standard of reasonableness (*Martin v Canada (Minister of Citizenship and Immigration)*, 2015 FC 422 at paras 23-24, [2015] FCJ No 438 [*Martin*]; *Alvarez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 667 at para 18, [2011] FCJ No 839; *Afridi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 193 at para 16, [2014] FCJ No 194 [*Afridi*]; *Shabdeen v Canada (Minister of Citizenship and Immigration)*, 2014 FC 303 at para 13, [2014]

FCJ No 327 [*Shabdeen*]; *Marques v Canada (Minister of Citizenship and Immigration)*, 2010 FC 376 at para 20, [2010] FCJ No 424 [*Marques*]; *Ali v Canada (Minister of Citizenship and Immigration)*, 2008 FC 784 at para 9, [2008] FCJ No 985 [*Ali*]; *Nasso v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1003 at para 12, [2008] FCJ No 1248 [*Nasso*]).

[33] 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" (*Dunsmuir* at para 47).

VI. Analysis

A. *Procedural fairness*

[34] The applicant raises three specific breaches of procedural fairness: the failure to disclose the recommendations of March 13, 2014, and April 11, 2014, before the decision was rendered; the failure to disclose the Canada Border Services Agency (CBSA) report of November 1, 2012, before the decision was rendered; and a biased approach that raises a reasonable apprehension of bias.

(1) Non-disclosure of CBSA's internal recommendations and report

[35] I will begin by addressing the failure to disclose the CBSA's internal recommendations and report.

[36] The applicant submits that in this case, he was entitled to a high degree of procedural fairness because of the significant consequences for himself and his family of the Deputy Minister's refusal to issue him a TRP. He submits that the factors in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 [*Baker*], militate in favour of more rigorous procedural protections. More particularly, he invokes the importance of the decision for the persons involved, the lack of a right of appeal and the legitimate expectations created by section 8 of the OP1 Manual. He notes that this decision prevents him from visiting his wife and children in Canada and providing them with the support they need, forcing them to leave Canada to see him.

[37] The respondents, on the other hand, submit that a decision-maker's obligations with respect to procedural fairness in the context of processing a TRP application are at the lower end of the procedural fairness spectrum since the proceedings are not adversarial, the decision is highly discretionary and the consequences of the decision for the family are attenuated by the family's considerable mobility and wealth. The respondents submit that the fact that TRP applications must be processed quickly should also be kept in mind.

[38] In *Baker*, at paragraphs 21 and 33, the Supreme Court of Canada recalled that the content of the duty of fairness is variable, flexible and needs to be decided in context. At paragraph 30, the Court noted that "[a]t the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly." The Court did not dictate the content of the duty of fairness, but it identified guidelines for determining the scope of the duty in a given context. They are summarized in *Congrégation*

des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village), 2004 SCC 48, [2004] 2 SCR 650 at para 5:

> The content of the duty of fairness on a public body varies according to five factors: (1) the nature of the decision and the decision-making process employed by the public organ; (2) the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates; (3) the importance of the decision to the individuals affected; (4) the legitimate expectations of the party challenging the decision; and (5) the nature of the deference accorded to the body: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. . . .

[39] I find that the circumstances in this case militate in favour of an obligation of fairness that is somewhat higher than the lowest end of the spectrum, but lower than that applicable to decisions involving a danger opinion or a declaration of inadmissibility.

[40] The decision as to whether to issue a TRP is highly discretionary, and the onus is on the applicant to demonstrate the circumstances that would justify it. Moreover, in some circumstances, decisions about TRP applications must be rendered quickly, and the consequences are not permanent. These factors suggest a less stringent duty of fairness.

[41] I find the comments of Justice Evans in *Khan v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 345 at para 32, [2001] FCJ No 1699, made in the context of a visa application, equally applicable to TRPs:

> 32 Finally, when setting the content of the duty of fairness appropriate for the determination of visa applications, the Court must guard against imposing a level of procedural formality that, given the volume of applications that visa officers are required to process, would unduly encumber efficient administration. The public interest in containing administrative costs and in not

> hindering expeditious decision-making must be weighed against the benefits of participation in the process by the person directly affected.

[42] However, the particular context of this case militates in favour of more than a minimal degree of fairness because of the impact of the refusal of a TRP on the applicant's family, which is the impossibility for the applicant to enter Canada to visit his wife and children. This is somewhat attenuated by the family's mobility, the applicant's financial means and the fact that the refusal to issue a TRP does not result in the definitive separation of the family. Furthermore, the applicant can always submit new TRP applications.

[43] The Court has dealt with several cases in which the alleged breaches of procedural fairness involved, as with this case, the failure to disclose documents or information before the decision was rendered.

[44] In *Haghighi v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FC 407 at paras 26-28, [2000] FCJ No 854 (CA) [*Haghighi*], the Federal Court of Appeal had to determine whether an immigration officer processing a humanitarian and compassionate application based in part on a fear of persecution had violated procedural fairness by failing to disclose a pre-removal risk assessment report prepared by another officer. The Court favoured an approach that took into account various elements such as the nature of the decision and the possible impact of the document at issue on the decision to determine whether its disclosure was required to enable the applicant to participate in a meaningful manner in the decision-making process.

[45] The Federal Court of Appeal was again invited to consider the duty to disclose certain documents before a decision was rendered in *Bhagwandass v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 49, [2001] 3 FC 3 [*Bhagwandass*], but this time in the context of a public danger opinion. The documents at issue, which had not been disclosed, were internal reports prepared by public servants that included an analysis of the file and a negative recommendation to the Minister. The Court addressed the *Haghighi* principles and emphasized the adversarial nature of the procedure for issuing a public danger opinion:

> 22 *Haghighi* also establishes that, in considering whether the duty of fairness requires advance disclosure of an internal Ministry report on which a decision maker will rely in making a discretionary decision, the question is not whether the report is or contains extrinsic evidence of facts unknown to the person affected by the decision, but whether the disclosure of the report is required to provide that person with a reasonable opportunity to participate in a meaningful manner in the decision-making process. The factors that may be taken into account in that regard may include the following: (i) the nature and effect of the decision within the statutory scheme, (ii) whether, because of the expertise of the writer of the report or other circumstances, the report is likely to have such a degree of influence on the decision maker that advance disclosure is required to "level the playing field", (iii) the harm likely to arise from a decision based on an incorrect or ill-considered understanding of the relevant circumstances, (iv) the extent to which advance disclosure of the report is likely to avoid the risk of an erroneously based decision, and (v) any costs likely to arise from advance disclosure, including delays in the decision-making process.
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> . . .
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> 31 Finally, the Crown argues that the danger opinion procedure is not adversarial and for that reason the Minister's duty of fairness fall at the low end of the spectrum. I cannot accept this argument. It seems to me, on the contrary, that the danger opinion procedure adopted by the Minister suggests the need for a higher standard of fairness than for subsection 114(2) decisions. That is because the procedure is adversarial from the outset and remains so until its conclusion. The procedure in this case began with the letter of intent dated June 19, 1998 which informed Mr. Bhagwandass that an official of the Ministry believed that a danger opinion was

> warranted. It speaks of representations, arguments and evidence being considered by the Minister, which are clearly the badges of an adversarial process. The last step in the procedure, before the decision was rendered, was the presentation to the Minister's delegate of the Ministerial Opinion Report and the Request for Minister's Opinion. Given their content and apparent purpose, those documents can properly be characterized as instruments of advocacy, in which Ministry officials recommend the rendering of a danger opinion and state the facts that they believe justify such a recommendation. The documents indicate as clearly as can be that Ministry officials had aligned themselves against Mr. Bhagwandass. They are not to be criticized for that. They were obviously asked for their views and were entitled to state them. But to characterize the procedure as non-adversarial is simply not consistent with the evidence.
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> [Emphasis added.]

[46] In *Chu v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 113 at para 10, [2001] FCJ No 554, leave to appeal to SCC refused, 28647 (June 11, 2001), the Federal Court of Appeal again addressed the obligation to disclose an internal report containing a recommendation that had been prepared by public servants in the context of a danger opinion; it applied the principles set out in *Bhagwandass*, again emphasizing the particular procedure applicable to danger opinions.

[47] These principles were also applied in the context of decisions about permanent residence applications and inadmissibility. In several cases, the documents at issue involved unfavourable reports from the CBSA or the Canadian Security Intelligence Service. *Mekonen v Canada (Minister of Immigration and Citizenship)*, 2007 FC 1133, [2007] FCJ No 1469 is often cited as a key reference for this issue. In that case, a visa officer had refused a permanent residence application and declared the applicant inadmissible for security reasons. The officer had not disclosed certain documents before rendering the decision, including a CBSA report that

provided evidence in support of inadmissibility and certain information from public sources.

Justice Dawson summarized the *Haghighi* and *Bhagwandass* factors as follows:

> 12 The content of the duty of fairness is variable and contextual; it is not abstract or absolute. In two cases, *Haghighi v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 407 (C.A.), and *Canada (Minister of Citizenship and Immigration) v. Bhagwandass*, [2001] 3 F.C. 3 (C.A.), the Federal Court of Appeal considered whether an officer was required by the duty of fairness to disclose for comment to the person affected by the officer's decision a report received by the officer. The issue arose in *Haghighi* in the context of an inland humanitarian and compassionate application and in *Bhagwandass* in the context of a danger opinion. In both cases, the Court applied five factors in order to determine whether disclosure of the report in question was required in order to provide the person concerned with a reasonable opportunity to participate in a meaningful fashion in the decision-making process. The factors were:
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> (1) the nature and effect of the decision within the statutory scheme;
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> (2) whether, because of the expertise of the writer of the report or other circumstances, the report was likely to have such a degree of influence over the decision-maker that advance disclosure was required in order to "level the playing field";
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> (3) the harm likely to arise from a decision based upon an incorrect or ill-considered understanding of the relevant circumstances;
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> (4) the extent to which advance disclosure of the report was likely to avoid the risk of an erroneously-based decision; and
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> (5) any costs likely to arise from advance disclosure, including delays in the decision-making process.

[48] Applying these principles, Justice Dawson mainly insisted on the fact that a decision on inadmissibility did not involve the exercise of a discretionary power and that the objectiveness of the decision and the absence of an appeal process played in favour of an extensive duty of

fairness. She reached the following conclusion with respect to the factor involving the degree of influence that the report was likely to have on the decision-maker:

> 19 The content and purpose of the CBSA memorandum lead me to conclude that it was an instrument of advocacy designed, in the words of the Federal Court of Appeal in *Bhagwandass*, "to have such a degree of influence on the decision maker that advance disclosure is required 'to 'level the playing field'".

[49] The same factors were applied in similar circumstances in various judgments of this Court, and in the majority of these files, the nature of the information contained in the documents and the influence they had on the decision-maker were determinative factors (*Krishnamoorthy* at para 37).

[50] The applicant maintains that, in this case, the failure to disclose to him the negative recommendation of the Case Management Branch, dated April 11, 2014, violated procedural fairness. He submits that the negative recommendation was an "instrument of advocacy" in that it was bound to have such an influence on the Deputy Minister that its advance disclosure was necessary to provide the applicant with a reasonable opportunity to participate in the decision-making process. The applicant notes that the Deputy Minister relied heavily on the recommendation, going so far as to adopt it in his reasons, and that the text of the recommendation raised certain doubts (contradictions between the interview notes and the TRP application undermining his credibility, lack of evidence regarding his involvement with his family, proceedings in the French [TRANSLATION] "ill-gotten gains" investigation) to which he did not have an opportunity to respond. The applicant submits that the recommendation does not contain a mere summary of the facts, but includes an analysis that ignored important facts and arguments about the circumstances of the inadmissibility.

[51] The applicant adds that if the recommendation had been disclosed to him, he could have made submissions and raised arguments against the premises on which the recommendation was based, such as the fact that the inadmissibility decision was under judicial review. He also could have dissipated the Deputy Minister's concerns, particularly those arising from the alleged contradictions involving his trips to Canada and his involvement in family life. The applicant submits that the disclosure of the recommendation would also have enabled him to raise his concerns about the biased approach to the processing of his application.

[52] The applicant also alleges that the recommendation made by Mr. Gilbert on March 13, 2014, which was the basis for the recommendation of April 11, 2014, should also have been disclosed to him, particularly given that that recommendation failed to mention the favourable CBSA report of November 1, 2012. That report would have been useful for the Deputy Minister's review of the seriousness of the inadmissibility for the purpose of weighing it against the best interests of the applicant's children.

[53] I find that the disclosure of Mr. Gilbert's recommendation of March 13, 2014, is not really at issue. First, this recommendation was addressed to the Case Management Branch and not the Deputy Minister, and there is no evidence that the Deputy Minister even looked at it. What is at issue is the report of April 11, 2014, containing the analysis and recommendation of the Case Management Branch that was provided to the Deputy Minister.

[54] The respondents submit that this report formed part of the reasons for the decision rendered by the Deputy Minister (*Miller v Canada (Solicitor General)*, 2006 FC 912 at para 63,

[2006] FCJ No 1164) and that, accordingly, it did not have to be disclosed to the applicant in advance. I do not agree. I am of the view that the fact that the report, including the recommendation it contains, can be considered part of the Deputy Minister's reasons does not resolve the issue of whether or not the Deputy Minister had a duty to disclose it to the applicant before rendering a decision. As Justice Sharlow wrote in *Bhagwandass*, at para 34, in a context in which a similar argument was raised, the report of the Case Management Branch could not be the reasons for a decision that had yet to be rendered.

[55] The issue is instead whether the disclosure of this report was required to enable the applicant to participate in a meaningful way in the decision-making process.

[56] First, it must be kept in mind that the Deputy Minister had to render a highly discretionary decision, the nature and effect of which are less important than a decision about a danger opinion or inadmissibility, for instance.

[57] The Deputy Minister's decision also shows that the analysis and recommendation of the Case Management Branch did influence his decision. He even indicated in his decision that he had analyzed all the circumstances, including the recommendation, which he had signed. In this context, I consider the report of the Case Management Branch to be an advocacy instrument.

[58] However, for the reasons below, I find that its advance disclosure to the applicant was not required.

[59] First, the report does not refer to any report, document or information that was unknown to the applicant or to sources of information unknown to him. The analysis and recommendation of the Case Management Branch are essentially based on the decision of December 20, 2013, to refuse the applicant's permanent residence application; the notes on the interview conducted by the immigration officer on September 25, 2012; and the affidavits and documentary evidence filed by the applicant in support of his TRP application.

[60] Next, the applicant should have expected that these documents would be consulted, even though they came from another file. The merits of his inadmissibility were not directly at issue in the processing of the TRP application, but the inadmissibility constituted the [TRANSLATION] "circumstance" giving rise to a TRP application. In other words, the inadmissibility was the raison d'être and essential prerequisite of the TRP application; otherwise, the applicant could simply have applied for a TRV. In this context, it was open to the Deputy Minister to consult the decision of December 20, 2013, and the interview notes, and this should not have come as a surprise to the applicant. I find that the Deputy Minister could refer to these without informing the applicant for the purpose of enabling the latter to make submissions.

[61] I am also of the view that the principles developed in the case law regarding the disclosure of documents and information must, in this case, be viewed in light of the applicant's duty to establish his right to a TRP.

[62] I find that the case law applicable to visas, which clearly recognizes that the onus is on applicants to file sufficient evidence in support of their applications, is equally applicable to

TRPs. This case law establishes that it is not for the officer to inform the applicant that the evidence is inadequate or provide him or her with an opportunity to respond to concerns arising from an application that is unclear, incomplete or lacking sufficient evidence. The duty of fairness may require that officers disclose their concerns to applicants and provide them with an opportunity to respond when they relate to the credibility, veracity or authenticity of the evidence submitted by the applicant or to information of which the applicant could not have been aware. The duty of fairness does not, however, require that the applicant be provided with a running score or an opportunity to add to an incomplete or inadequately supported application. Justice Mosley provided a good description of these parameters in *Rukmangathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 284 at paras 22-23, [2004] FCJ No 317:

> 22 It is well established that in the context of visa officer decisions procedural fairness requires that an applicant be given an opportunity to respond to extrinsic evidence relied upon by the visa officer and to be apprised of the officer's concerns arising therefrom: *Muliadi*, *supra*. In my view, the Federal Court of Appeal's endorsement in *Muliadi*, *supra*, of Lord Parker's comments in *In re H.K. (An Infant)*, [1967] 2 Q.B. 617, indicates that the duty of fairness may require immigration officials to inform applicants of their concerns with applications so that an applicant may have a chance to "disabuse" an officer of such concerns, even where such concerns arise from evidence tendered by the applicant. Other decisions of this court support this interpretation of *Muliadi*, *supra*. See, for example, *Fong v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 705 (T.D.), *John v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No 350 (T.D.) (QL) and *Cornea v. Canada (Minister of Citizenship and Immigration)* (2003), 30 Imm. L.R. (3d) 38 (F.C.T.D.), where it had been held that a visa officer should apprise an applicant at an interview of her negative impressions of evidence tendered by the applicant.
>
> 23 However, this principle of procedural fairness does not stretch to the point of requiring that a visa officer has an obligation to provide an applicant with a "running score" of the weaknesses in their application: *Asghar v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1091 (T.D.)(QL) at para. 21 and *Liao v. Canada (Minister of Citizenship and Immigration)*, [2000]

> F.C.J. No. 1926 (T.D.)(QL) at para. 23. And there is no obligation on the part of a visa officer to apprise an applicant of her concerns that arise directly from the requirements of the former *Act* or *Regulations*: *Yu v. Canada (Minister of Employment and Immigration)* (1990), 36 F.T.R. 296, *Ali v. Canada (Minister of Citizenship and Immigration)* (1998), 151 F.T.R. 1 and *Bakhtiania v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No.1023 (T.D.)(QL).
>
> [Emphasis added.]
>
> [See also *Chawla v Canada (Minister of Citizenship and Immigration)*, 2014 FC 434 at para 14, [2014] FCJ No 451; *Kaur v Canada (Minister of Citizenship and Immigration)*, 2014 FC 678 at paras 17-18, [2014] FCJ No 745; *Hussaini v Canada (Minister of Citizenship and Immigration)*, 2013 FC 289 at para 10, [2013] FCJ No 318.]

[63] Justice Snider adopted these principles in *Baybazarov v Canada (Minister of Citizenship and Immigration)*, 2010 FC 665, [2010] FCJ No 930 in a context in which the information that had not been disclosed to the applicant was contained in a CBSA report. She wrote the following:

> 11 First and foremost, applicants have the burden to establish entitlement to a visa. Applicants bear the responsibility to produce relevant information to assist their application. There is no obligation on officers to apprise an applicant of concerns that arise directly from statutory requirements. Officers are also not required to give applicants a "running score" of weaknesses in applications. See *Rukmangathan*, above, at paragraph 23; *Nabin v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 200, [2008] F.C.J. No 250, at paragraph 7; *Rahim v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1252, 58 Imm. L.R. (3d) 80 at paragraph 14.
>
> 12 Second, officers have a duty to notify applicants where: a) concerns arise about credibility, accuracy or genuineness of the information submitted (see *Nabin*, above, at para. 8); or b) the officer has relied on extrinsic evidence (see *Rukmangathan*, above, at para. 22; *Nabin*, above, at para. 8; *Mekonen*, above, at para. 4). The purpose of this duty is to allow applicants a fair and reasonable

> opportunity to know the case against them and to respond to concerns.
>
> [Emphasis added.]
>
> [See also *Enriquez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1091 at paras 26-27, [2012] FCJ No 1177; *Krishnamoorthy* at paras 37-38.]

[64] In this case, the report of the Case Management Branch raises certain contradictions between the applicant's statements made during the interview of September 25, 2012, and those included in the TRP application, particularly with respect to the frequency of his visits to Canada, but I find that these contradictions were not determinative in the analysis of the file because the fact that the applicant spent more time outside Canada than in Canada was uncontested. The other contradiction involving the change in the location of Socotram headquarters was also minor.

[65] Moreover, a reading of the elements taken into consideration by the Case Management Board shows that its recommendation is primarily based on its finding that the points raised and evidence submitted by the applicant were insufficient to justify the issuance of a TRP. The report reveals that the Case Management Board found that the applicant had not submitted adequate evidence in support of his allegation that his wife and two children had health problems that required his presence and his allegation that he actively participated in the family's life while he was outside Canada.

[66] Finally, the recommendation contains no new concerns to which the applicant should have been given the opportunity to respond in order to participate in a meaningful way in the decision-making process.

[67] I therefore find that the report of the Case Management Board contained no fact or information of which the applicant was not aware. In *Ulybin v Canada (Minister of Citizenship and Immigration)*, 2013 FC 629, [2013] FCJ No 661, a permanent residence application was refused on the ground that the applicant had been convicted in Spain of offences in connection with a construction accident resulting in the death of a worker. The main issue was equivalence with offences in Canadian law, and the applicant had made very detailed submissions on that point. In that context, Justice Snider found that the failure to disclose the opinion of a legal officer at National Headquarters in Ottawa did not constitute a breach of procedural fairness because the applicant had been given the opportunity to participate fully in the decision-making process, and the decision-maker had no obligation to provide a "running score". Justice Snider stated the following:

> 26 Although the NHQ opinion may have played a significant role in the Officer's decision, the Officer did not breach procedural fairness by failing to disclose it. The duty of fairness is at the low end of the spectrum in the context of visa applications (*Khan v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 345 at paras 30-32, [2002] 2 FC 413). Further, the NHQ opinion was based on documentary evidence and legal submissions that the Applicant provided. Although fairness may require disclosure where the Officer draws certain conclusions based on extrinsic information, the Officer's duty does not extend to providing a "running score" based on information submitted by the Applicant (*Ronner v Canada (Minister of Citizenship and Immigration)*, 2009 FC 817 at paras 43-45, [2009] FCJ No 923).
>
> [Emphasis added.]

[68] These principles are equally applicable in this case. Requiring the advance disclosure of the report of the Case Management Branch would have amounted to requiring that a running score be provided. I am of the view that the Deputy Minister had no obligation to provide the applicant with a preliminary opinion on the adequacy of the evidence he had submitted in support of his TRP application.

[69] I also adopt the statements of Justice Phelan in *Thandal v Canada (Minister of Citizenship and Immigration)*, 2008 FC 489 at para 9, [2008] FCJ No 623:

> 9 It is well established that an applicant has the burden of establishing her case. Generally, an applicant is to do that once, rather than on the basis of some sort of rolling story of reply, sur-reply and so forth.

[70] Furthermore, the case law does not require a decision-maker to send a draft of his or her decision to the person affected by it (*Monemi v Canada (Solicitor General)*, 2004 FC 1648 at para 17, [2004] FCJ No 2004; *Mia v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1150 at para 11, [2001] FCJ No 1584; *Chen v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 266 at paras 16-17, [2002] FCJ No 341; *Chowdhury v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 389 at paras 11-12, 18 [2002] FCJ No 503).

[71] I will now address the CBSA report dated November 1, 2012.

[72] The applicant submits that this report, which he learned about when the Certified Tribunal Record was filed in Docket IMM-1144-14, should also have been disclosed to him so

that he could make submissions on it before the Deputy Minister rendered his decision. The applicant argues that this report, which concluded that there was insufficient evidence to support a finding that there were reasonable grounds to believe that he was inadmissible under paragraph 37(1)(*a*) of the IRPA, was relevant to evaluating the relative seriousness of the inadmissibility and all of the circumstances relating to the processing of the application for the issuance of a TRP.

[73] With respect, I find that the report prepared by the CBSA on November 1, 2012, was not a relevant document for the purposes of processing the TRP application; accordingly, it did not have to be disclosed to the applicant before a decision concerning his TRP application was rendered.

[74] First, as I mentioned above, the Deputy Minister did not have to re-determine the issue of inadmissibility or call into question the decision made by the immigration officer on December 20, 2013, even though the applicant intended to dispute this decision. At the time when the TRP application was processed, the decision declaring the applicant to be inadmissible was in full force. The Deputy Minister also had to consider the nature of the inadmissibility, but to do so, it was appropriate and sufficient for him to rely on the decision of the officer who had determined the inadmissibility. It was not necessary for the Deputy Minister to consider in an exhaustive manner the evidence that had been analyzed by the immigration officer. This would have created an unnecessary duplication of work and risked contradictory decisions on inadmissibility being made.

[75] Second, this report was prepared by a partner agency in November 2012, more than a year before the decision of December 2013 declaring the applicant to be inadmissible and before the applicant submitted the additional documents required by the immigration officer. Moreover, the immigration officer did not rely on this report for her decision declaring the applicant inadmissible. I therefore fail to see how this document could have been useful for processing the TRP application. I am therefore of the view that it did not need to be disclosed to the applicant.

[76] It is also clear that the Deputy Minister did not rely on this report to render his decision. He was therefore under no obligation to disclose it to the applicant.

(2) Reasonable apprehension of bias

[77] The applicant submits that several elements in the processing of his file raise a reasonable apprehension of bias.

[78] In this respect, he suggests that the failure to disclose to him the two internal recommendations demonstrates a biased approach and raises a reasonable apprehension of bias. The applicant also notes that the CBSA report, which was not in the Certified Tribunal Record, should have been among the documents submitted to the Deputy Minister since it would have been useful for the proper balancing of the relative seriousness of the inadmissibility with the best interests of the children.

[79] The applicant also submits that the recommendations of March 13, 2014, and April 11, 2014, mention only negative aspects, which demonstrates bias. He argues that the

recommendation provides an incomplete background and leaves out facts relevant to understanding the situation as a whole. He submits that it was necessary for the Deputy Minister to be informed about all of the circumstances, including the favourable ones, given the importance of the decision for the applicant and his family and the serious consequences of a negative decision.

[80] The applicant adds that a biased approach is also apparent from the transmission of an incomplete record. The applicant, who requested the reasons for the decision, first received the recommendation of March 13, 2014, while the one incorporated into the reasons is that of April 11, 2014. The applicant also notes that counsel for the respondent had claimed that the GCMS notes were [TRANSLATION] "complete", despite the fact that the recommendation of April 11, 2014, had not been provided, and that its content differed from the recommendation of March 13, 2014, which had been copied into the GCMS notes.

[81] The applicant added that an email between Mr. Gilbert and the immigration officer who rendered the inadmissibility decision dated February 21, 2014, which was included in the Certified Tribunal Record, also raises a reasonable apprehension of bias. In the email, which Mr. Gilbert forwarded to several people, he asked that a conference call be organized to [TRANSLATION] "discuss strategy".

[82] There is no doubt that procedural fairness requires that decisions be rendered by an impartial decision-maker (*Baker* at para 45). The test for bias is that set out by Justice de

Grandpré, writing in dissent, in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at 394, 68 DLR (3d) 716:

> 40 . . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

[83] The impartiality of the decision-maker is presumed, and the apprehension of bias must be based on tangible elements. In this respect, I adopt the statements of Justice Layden-Stevenson in *Ayyalasomayajula v Canada (Minister of Citizenship and Immigration)*, 2007 FC 248 at paras 14-15, [2007] FCJ No 320:

> 14 In short, a finding of reasonable apprehension of bias on the part of a decision-maker requires something more than an allegation. The evidence before me does not demonstrate a reasonable apprehension of bias.
>
> 15 In the absence of any evidence to the contrary, it must be presumed that a decision-maker will act impartially: *Zündel v. Citron*, [2000] 4 F.C. 225 (C.A.) leave to appeal refused, [2000] S.C.C.A. No. 322. Even in the context of judicial hearings, the apprehension of bias must be reasonable and be held by reasonable and right-minded persons applying themselves to the question and obtaining the required information. The question is -- what would an informed person, viewing the matter realistically and practically, having thought the matter through, conclude? The grounds must be substantial and the test should not be related to the very sensitive or scrupulous conscience. A real likelihood or probability of bias must be demonstrated and mere suspicion is not sufficient: *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369.

[84] In this case, nothing indicates a reasonable apprehension of bias on the part of the Deputy Minister or anybody else involved in the file.

[85] As I have mentioned above, I am of the view that the Deputy Minister was under no obligation to disclose to the applicant the recommendations of March 13, 2014, and April 11, 2014, or the CBSA report. Accordingly, no apprehension of bias can arise from the failure to disclose these documents to the applicant before making a decision.

[86] As indicated above, I am also of the view that the CBSA report was not a relevant document for the purposes of processing the TRP application. Accordingly, the fact that the Deputy Minister did not know about this report, or, if he did, that he failed to mention it in his decision, does not raise a reasonable apprehension of bias or demonstrate a biased approach.

[87] As for sending an incomplete file, it is true that it was the internal recommendation of March 13, 2014, and not that of April 11, 2014, which was initially sent to the applicant. However, there is no indication that this omission came of a desire to hide information from the applicant or a refusal to disclose all of the relevant information to him. The record instead suggests that counsel for the respondent initially believed that the two recommendations were one and the same document.

[88] As for the email sent by Mr. Gilbert to the immigration officer in which he proposed a conference call to [TRANSLATION] "discuss strategy", this element is insufficient to raise a reasonable apprehension of bias because there is no indication that the Deputy Minister was

aware of this email nor any evidence regarding the content of the subsequent exchanges between Mr. Gilbert and the immigration officer.

[89] I also find that the Case Management Branch and the Deputy Minister did not present a truncated version of the facts and circumstances relevant to the analysis of the applicant's TRP application.

[90] I therefore find that procedural fairness was not violated in this case, that the process was fair and raises no apprehension of bias and that the applicant had the opportunity to participate in a meaningful way in the decision-making process.

B. *Errors of law*

[91] The applicant submits that the Deputy Minister committed three errors of law.

[92] First, he suggests that the Deputy Minister imposed an overly strict standard of proof by requiring that the applicant show "exceptional circumstances" and "sufficient and compelling reasons" to justify issuing a TRP, while the text of section 24 of the IRPA simply indicates that a TRP is issued if the officer "is of the opinion that it is justified in the circumstances." The applicant cites *Rodgers v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1093 at para 10, [2006] FCJ No 1378 [*Rodgers*]. The applicant therefore argues that the Deputy Minister imposed a higher burden on him that that required by the wording of the statute.

[93] The wording of subsection 24(1) of the IRPA clearly states that this is an exceptional regime, and, as I mentioned above, it is well established that the issuance of a TRP is a highly discretionary decision (*Afridi*, at para 16; *Stordock v Canada (Minister of Citizenship and Immigration)*, 2013 FC 16 at para 9, [2013] FCJ No 7 [*Stordock*]; *Farhat v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1275 at para 16, [2006] FCJ No 1593 [*Farhat*]).

[94] I am of the view that *Rodgers* cannot serve as a precedent for the applicable standard for determining whether the circumstances justify the issuance of a TRP, as the comments of Justice von Finckenstein at paragraph 10 of the judgment are limited to distinguishing between the analysis of the circumstances justifying the issuance of a TRP and the deeper analysis of the humanitarian and compassionate considerations required by section 25 of the IRPA.

[95] Also, the case law has clearly recognized that applying the exceptional and compelling circumstances test is consistent with the objectives of section 24 of the IRPA and does not constitute a reviewable error.

[96] At paragraph 22 of *Farhat*, Justice Shore wrote the following about the objectives of the TRP regime:

> [22] The objective of section 24 of IRPA is to soften the sometimes harsh consequences of the strict application of IRPA which surfaces in cases where there may be "compelling reasons" to allow a foreign national to enter or remain in Canada despite inadmissibility or non-compliance with IRPA. Basically, the TRPs allow officers to respond to exceptional circumstances while meeting Canada's social, humanitarian, and economic commitments. (Immigration Manual, c. OP 20, section 2; Exhibit "B" of Affidavit of Alexander Lukie; *Canada (Minister of*

> *Manpower and Immigration) v. Hardayal*, 1977 CanLII 162 (S.C.C.), [1978] 1 S.C.R. 470 (QL).)

[97] The "compelling reasons" test has since been upheld by the case law of this Court, particularly in *Nasso* at paras 13-15 and *Stordock* at para 9. In *Nasso*, Justice Zinn addressed the very argument raised by the applicant—that this standard is too high given the wording of subsection 24(1) of the IRPA—and he concluded that the officer had applied the proper test:

> [13] Mr. Nasso submits that the officer erred in his interpretation of section 24(1) of the Act by reading in a requirement that there be a "compelling need" shown by an applicant before the exemption is warranted. . . .
>
> [14] It is submitted that while the officer's interpretation is consistent within the policy guideline, IP1 – Temporary Resident Permits, it imposes on section 24(1) of the Act a condition greater than the requirement specified in that section that the permit be "justified in the circumstances".
>
> [15] I am not convinced that there is any misinterpretation of section 24(1), as alleged. As is noted by Justice Shore in *Farhat*, section 24 of the Act allows officers to soften the harsh consequences of a strict application of the Act in "exceptional circumstances". It seems to me that an applicant who cannot satisfy an officer that he has a requirement or, to use the words of the decision under review, a compelling need to enter Canada, cannot establish that a permit is justified in the circumstances. In other words, to be granted a TRP in these exceptional circumstances requires more than showing that one has a wish or desire to enter Canada – it requires much more – otherwise, it is not an exceptional circumstance. When the Applicant claims that he needs to enter Canada for business purposes, then he ought to be able to establish that those purposes cannot be met or satisfied from his own country but require his presence in Canada. That, to my mind, is a compelling need. Accordingly, I find that the officer did not misinterpret the requirements in section 24(1) of the Act.
>
> [Emphasis added.]

[98] In fact, this is still the test set out in Immigration Manual OP 20 – Temporary Resident Permits (TRPs), available online at http://www.cic.gc.ca/english/resources/tools/temp/permits/eligibility.asp:

> **Who is eligible for a TRP**
>
> A TRP can be issued to a foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of IRPA (A24(1)).
>
> The TRP is always issued at the discretion of the delegated authority and may be cancelled at any time. The delegated authority will determine whether the need for the:
>
> • foreign national to enter or remain in Canada is compelling; and
>
> • foreign national's presence in Canada outweighs any risk to Canadians or Canadian society.
>
> [Emphasis added.]

[99] These manuals have no force of law, but they may be useful (*Afridi*, at para 18; *Martin*, at para 28; *Shabdeen*, at paras 16-17).

[100] The applicant understood perfectly well that this was the applicable test because in his TRP application, he argued that there were compelling reasons, which he went on to describe in detail, requiring that he continue to sojourn in Canada with his wife and children. I am therefore of the view that the Deputy Minister's interpretation of subsection 24(1) of the IRPA was consistent with the case law and that his interpretation of the "justified in the circumstances" standard for issuing a TRP was not unreasonable. I would reach the same conclusion even if the interpretation of subsection 24(1) of the IRPA were to be reviewed on a standard of correctness,

since I find that the Deputy Minister did not err in law with respect to the general standard applicable to TRP applications.

[101] Second, the applicant argues that the Deputy Minister should have analyzed the best interests of his children and his wife by considering their constitutional right to stay in Canada under section 6 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (UK), 1982, c 11 (the Charter) and under the *Convention of the Rights of the Child*, GA Res 44/25, UN GAOR, 44th Sess, UN Doc A/RES/44/25 (1989) and that the obligation to leave Canada to see the applicant compromised or limited this right to remain in Canada. The applicant submits that the Deputy Minister erred in failing to address the issue of the constitutional rights of his wife and children in his decision and the harm that results from a negative decision that compromises their right to remain in Canada. The applicant also argues that the principles developed in *Doré v Barreau du Québec*, 2012 SCC 12 at paras 54-57, [2012] 1 SCR 395 apply and that the Deputy Minister failed to consider their Charter-protected right and to weigh the seriousness of the infringement of the value protected by the Charter against the objectives of the IRPA.

[102] I find, with respect, that the constitutional rights of the applicant's wife and children are not at issue in this case. The applicant's wife and their Canadian children enjoy the rights conferred by section 6 of the Charter, more particularly the right to remain in Canada. The applicant, on the other hand, has no right to enter or remain in Canada. However, he argues that his inadmissibility and the refusal to issue him a TRP compromise the right of his children and wife to remain in Canada because they are obliged to leave Canada to be able to spend time with

him. The applicant has cited no authority in support of his statement that the right of his children or his wife to remain in Canada includes the right to have the applicant sojourn in Canada so that he may visit them.

[103] I find that the comments of Justice Décary, written on behalf of the Federal Court of Appeal in *Langner v Canada (Minister of Employment and Immigration)*, [1995] FCJ No 469 at paras 7-9, 97 FTR 118, apply in this case, even though they were made in the context of an application for judicial review of a removal order involving foreigners whose children were born in Canada:

> 7 Even if the Charter were to be applied, we would try in vain to determine what protected right or freedom the appellants could complain had been violated. The appellants have no Charter right to remain in Canada, since the deportation order made against them is entirely consistent with the requirements of the Charter. The appellant children have no Charter right to demand that the Canadian Government not apply to their parents the penalties provided for violation of Canadian immigration laws.
>
> 8 The appellant children's rights and freedoms, which attach to their Canadian citizenship (section 6 of the Charter) are not in issue. Regardless of the decision made by their parents, the children will retain their Canadian citizenship and will be subject to no constraints in the exercise of the rights and liberties associated with their citizenship other than the constraints the parents impose in the exercise of their parental authority. If the parents choose to take the children to Poland and if other members of the family were of the opinion that this decision was not made in the best interests of the children, the children's right to remain in Canada could be the subject of a private proceeding, at the conclusion of which the Canadian courts would be required to rule as to whether the parents' decision is contrary to the interests of the children.

[104] I am therefore of the view that the Deputy Minister did not err by not addressing the constitutional rights of the applicant's wife and children.

[105] It must be kept in mind that section 24 of the IRPA gives a highly discretionary power to the Minister and does not set out a list of specific factors to consider, unlike section 25, for example, which expressly states that the best interests of a child directly affected must be considered (*Afridi*, at para 21). However, the best interests of one or more children could certainly be among the circumstances raised in support of a TRP application and, in some cases, the failure to address the best interests of the children at issue could be seen as an error of law (*Ali*, at paras 12-13).

[106] In this case, the Deputy Minister's decision shows that he considered the interests of the applicant's children, their emotional ties with the applicant, the separation and the effect that a refusal to issue a TRP would have on them. It was not necessary for him to make explicit reference to the right of the applicant's wife and children to remain in Canada, as that right is not directly affected by the decision. The issue has more to do with the reasonableness of the Deputy Minister's assessment of the circumstances raised by the applicant, including the interests of and the impact of the decision on his wife and children. I will return to this point below.

[107] As a third error of law, the applicant submits that the Deputy Minister erred in invoking paragraph (3)(1)(*i*) of the IRPA, which was not at issue because the applicant does not represent a security risk for Canadians.

[108] Paragraph 3(1)(*i*) of the IRPA reads as follows:

Objectives — immigration	Objet en matière d'immigration
3. (1) The objectives of this Act with respect to	3. (1) En matière d'immigration, la présente loi a

immigration are	pour objet :
. . .	[…]
(*i*) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and	*i*) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité;

[109] First, it was not the Deputy Minister himself who cited this provision, but rather the Case Management Branch in its recommendation of April 11, 2014. Although the respondent submits that the recommendation forms part of the reasons for the Deputy Minister's decision, the Deputy Minister rendered his own reasons in which he indicated that he had performed a complete review of the file, including the recommendation of April 11, 2014, which he signed on April 14, 2014. Also, in signing the last section of the recommendation, the Deputy Minister was not necessarily adopting as his own every element of the analysis performed by the Case Management Branch. As mentioned above, at the end of the recommendation, he checked the following statement: [TRANSLATION] "I have reviewed all of the documents before me, and I have decided not to issue a temporary resident permit to Mr. Nguesso." He then added his signature. He did not state that he was ratifying every word used in the recommendation.

[110] In any event, I find that the reference to this provision did not constitute an error of law. The Case Management Branch noted that the refusal to issue a TRP to the applicant was consistent with one of the objectives of the IRPA, set out in paragraph 3(1)(*i*). This statement is not inaccurate given that, at the time the applicant's TRP application was processed, he had

indeed been declared inadmissible because the immigration officer had reasonable grounds to believe that he was involved in organized criminal activity. The declaration of inadmissibility for organized criminality does not require that the person have been convicted of crimes. In any event, this reference is not central to the decision rendered by the Deputy Minister, and what the applicant is really contesting is not so much the reference to this paragraph of the IRPA, but rather the factors considered by the Deputy Minister in the exercise of his discretionary power under section 24 of the IRPA.

C. *Unreasonableness of decision*

[111] The applicant submits that the Deputy Minister's decision is unreasonable because it misrepresents the reasons for which the applicant applied for a TRP. He adds that the Deputy Minister ignored evidence in concluding that the family had chosen to live separately when the family was in fact attempting to reunite to prevent the aggravation of an already fragile situation. He also criticizes the Deputy Minister for ignoring the evidence relating to his family involvement and his wife's medical note, as well as the other documents involving the particular needs and difficulties of the children. He also argues that the statute, the case law and common sense all agree that children are negatively affected by the absence of their father.

[112] He also submits that the Deputy Minister failed to attribute enough weight to the children's rights to live and remain in Canada or the harm arising from the obligation to leave Canada to see their father.

[113] Finally, the applicant argues that the Deputy Minister relied heavily on his inadmissibility, which was still being challenged before this Court, that he has no criminal record and has not been charged with anything. He emphasizes that the Deputy Minister also failed to consider the fact that his presence does not pose a security risk to Canadians.

[114] The analysis of the reasonableness of the decision must be performed according to the parameters set out in *Dunsmuir*. In *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at para 99, [2014] FCJ No 472, the Federal Court of Appeal set out the limits on the Court's power to intervene:

> 99 In conducting [a] reasonableness review of factual findings such as these, it is not for this Court to reweigh the evidence. Rather, under reasonableness review, our quest is limited to finding irrationality or arbitrariness of the sort that implicates our rule of law jurisdiction, such as a complete failure to engage in the fact-finding process, a failure to follow a clear statutory requirement when finding facts, the presence of illogic or irrationality in the fact-finding process, or the making of factual findings without any acceptable basis whatsoever: *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 at paragraphs 44-45; *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644 at page 669.

[115] I find that the Deputy Minister's decision has all of the attributes of reasonableness and that the applicant is essentially invoking a disagreement with the Deputy Minister's assessment of the evidence and the arguments he invoked in support of his TRP application.

[116] As mentioned above, the decision to issue a TRP is highly discretionary one that requires exceptional circumstances and must be analyzed in light of the circumstances of each case.

[117] I find that the Deputy Minister addressed the circumstances that were relevant in this case. He clearly considered the primary grounds raised by the applicant, namely, the special needs of his wife and children, his involvement in the family and the impact of a negative decision on the family.

[118] I find that it was not unreasonable for the Deputy Minister to conclude that the evidence submitted by the applicant was insufficient, particularly that relating to his wife's medical condition and the children's special needs.

[119] With respect to the medical and psychological evidence, the Deputy Minister did not specifically mention the medical note concerning the applicant's wife's condition or the correspondence with one of the children's teachers who was recommending psychological treatment. However, these elements do not establish the need for the applicant's presence in Canada. Ms. Mengue's medical note does not support her allegation that she needs to avoid stress, nor does it imply that her medical condition requires particular support from those close to her. Similarly, the occupational therapy report for one of the children discloses certain difficulties but does not show how the applicant's presence is necessary. The father's presence would no doubt be desirable for all children, but we are far from a situation like the one in *Martin*, for example, in which the applicant had to care for an insulin-dependent girl with diabetes, or in *Shabdeen*, in which the parents had to be with their autistic daughter while she was undergoing psychiatric assessments that required their direct involvement and consent. In this case, it was reasonable to conclude that there was no independent evidence supporting the medical grounds raised.

[120] I acknowledge that, if the family chose in 2006 to live in two different countries, the choice was likely made on the understanding that the applicant would be able to visit his family regularly while his permanent residence application was being processed. The Deputy Minister's comment about the family's choice to live in two different countries therefore strikes me as exaggerated and incomplete, but this is not enough to render the decision unreasonable, since the Deputy Minister dealt in depth with the actual effects of the separation on the family. The evidence involving the applicant's involvement in his family's day-to-day lives and the need for his increased presence to support his wife and children was limited. The affidavits of the applicant's wife and her mother, sister and cousin generally state that the applicant is a good father who takes responsibility for his children's education, that he visits them regularly and that the young boys in particular eagerly anticipate his visits. In the recommendation of April 11, 2014, it is noted that [TRANSLATION] "given the time actually spent in Canada and the total lack of evidence demonstrating that the applicant maintained his family involvement when outside of Canada, it seems unlikely that he is involved in the family's day-to-day activities or that Mr. Nguesso's presence in Canada is indispensible to his family." This finding appears reasonable because the affidavits do not provide any specific indication of the applicant's involvement in his family's life while he is outside of Canada or of the frequency and duration of his visits to Canada. The affidavits do not provide any additional information about the applicant's true involvement in the family's day-to-day affairs or the support he provides to his wife and children while he is in Canada.

[121] The evidence also shows that the applicant has sufficient financial means to allow his children and wife to visit him outside Canada regularly enough, although the frequency of the visits may be limited because the children are going to school.

[122] The case law has recognized that a decision-maker dealing with a TRP application is not required to perform an analysis of the best interests of the children as extensive as that required by an H&C application (*Afridi* at para 21; *Marques* at para 29; *Stordock* at para 11; *Farhat* at para 36).

[123] I find that in this case, the Deputy Minister considered the interests of the applicant's children in light of the test for issuing a TRP and the evidence submitted by the applicant.

[124] Finally, the applicant argues that the decision-maker failed to perform an analysis of danger, which is distinct from inadmissibility, even though the applicant alleged in his application that he did not pose a security risk to Canadians.

[125] I recognize that a person does not necessarily pose a security risk merely because he or she is inadmissible. However, the issue of whether the decision-maker should have considered a given element depends on its relative importance in the particular context of the case. In this case, the TRP application was primarily based on the special needs of the applicant's wife and children and on the need for him to be able to visit his family to offer them the support they needed. Given that the Deputy Minister judged that the evidence submitted by the applicant in

this respect was insufficient, there was no need for him to pursue further analysis to consider whether or not the applicant posed a security risk to Canadian citizens.

[126] I therefore find that the Deputy Minister's conclusions have an acceptable basis in the evidence, that his decision is neither arbitrary nor irrational and that his decision falls within the range of possible, acceptable outcomes (*Dunsmuir* at para 47).

[127] Therefore, this Court's intervention is not warranted.

VII. Certified question

[128] The respondents have proposed the following question for certification:

> [TRANSLATION]
>
> In the context of an application for a temporary resident permit (TRP) under subsection 24(1) of the *Immigration and Refugee Protection Act*, does the decision-maker's obligation to proceed fairly include an obligation to disclose to the TRP applicant the text of a recommendation to the decision-maker, in order to enable the applicant to make submissions before the decision on the TRP application is rendered?

[129] The applicant, on the other hand, submits that no question should be certified and that the question proposed by the respondent is inappropriate.

[130] Paragraph 74(*d*) of the IRPA sets out that for a question to be certified, it must be a serious question of general importance. It is well established that a question should not be certified unless it is a serious question of general importance that transcends the interests of the

parties to the litigation and is dispositive of the appeal (*Canada (Minister of Citizenship and Immigration) v Liyanagamage* (1994), 176 NR 4 at para 4 , [1994] FCJ No 1637; *Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 at para 11, [2004] FCJ No 368; *Lai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FCA 21 at para 4, [2015] FCJ No 125).

[131] Although the procedural fairness issue must be contextualized, I find that the proposed question nevertheless raises an important question that transcends the interests of the parties to this litigation and is dispositive of the appeal. This case raises the issue of whether, in the context of a TRP application, an internal report must be disclosed in advance when it contains an unfavourable internal recommendation based on facts, contradictions and elements contained in another file involving the applicant of which the applicant is aware. I find that this question transcends the interests of the parties and lends itself to a generic approach because it requires determining whether an internal recommendation may be considered an [TRANSLATION] "intermediate result" when based on information and facts of which the applicant is aware but which are obtained from a different file.

[132] I find, however, that the question is too general as proposed by the respondents, and I would reformulate it as follows:

> When considering an application for a temporary resident permit under section 24(1) of the IRPA, does the decision-maker's obligation to proceed fairly include an obligation to advise the applicant of an internal recommendation so that he can provide observations before the decision is rendered, when the recommendation contains an analysis that is

founded on proof that had been considered in the context of the decision declaring the applicant inadmissible and on proof filed by the applicant in support of the application for a TRP?

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. The following question is certified:

> When considering an application for a temporary resident permit under section 24(1) of the IRPA, does the decision-maker's obligation to proceed fairly include an obligation to advise the applicant of an internal recommendation so that he can provide observations before the decision is rendered, when the recommendation contains an analysis that is founded on proof that had been considered in the context of the decision declaring the applicant inadmissible and on proof filed by the applicant in support of the application for a TRP?

"Marie-Josée Bédard"
Judge

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	WILFRID GUY CÉSAR NGUESSO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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