**Date: 20061228**

**Docket: IMM-7552-05**

**Citation: 2006 FC 1556**

**Ottawa, Ontario, December 28, 2006**

**PRESENT: The Honourable Mr. Justice Lemieux**

**BETWEEN:**

**SUDIPTO SARKAR**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

### *Introduction*

[1] This is a judicial review application by Sudipto Sarkar, a citizen of India, who seeks to set aside the 19th of October, 2005 decision of designated Immigration Officer Keefe, (the Immigration Officer) who determined his application for permanent residence in Canada could not be accepted because his daughter Konika is inadmissible to Canada pursuant to subsection 38(1) of the *Immigration and Refugee Protection Act* (the Act) being a person whose health condition, Pervasive Development Disorder (PDD:Autism) might reasonably

be expected to cause excessive demand on social services and specifically on educational services. Under section 4(2)(a) of the *Act*, Dr. Sarkar was inadmissible because his daughter was inadmissible.

[2] The principal issue in this judicial review application is whether the Immigration Officer failed to comply with the Supreme Court of Canada's decision in *Hilewitz* v. *Canada (Minister of Citizenship and Immigration*) [2005] 2 S.C.R. 706, released on October 21, 2005, three days after she made her determination.

[3] At the time the Immigration Officer made her decision, the state of the law was expressed by the Federal Court of Appeal in *Hilewitz* v. *Canada (Minister of Citizenship and Immigration)* 2003 FCA 420 to the effect non-medical factors such as the ability and willingness of the family to pay for the excessive demand was not a relevant factor for an immigration officer to take into account. The Supreme Court of Canada reversed that decision and held the resources of the Hilewitz family could not be discarded in deciding whether their disabled child would create an excessive public burden.

[4] I reproduce in Appendix A to these reasons, section 38 of the *Act* and the definitions of "excessive demand", "health services" and "social services" provided for in section 1 of the *Immigration and Refugee Protection Regulations* (the Regulations) for the purposes of the *Act* and the *Regulations*.

[5] There is no issue between the parties that, at the present time, Konika's health condition and the burden it currently imposes on the educational system fit within the definition of "excessive demand" and "social services" in the *Regulations*.

[6] Moreover, for the purposes of this application, the Minister does not argue, as he did in *Colaco* v. *The Minister of Citizenship and* Immigration, 2006 FC 896 that *Hilewitz*, above, must be interpreted as being limited to business applicants for permanent residence, (investors, self-employed, or entrepreneurs) but not to the skilled worker class. In *Colaco* Justice Barnes rejected the Minister's interpretation and certified a question on the point.

***FACTS***

[7] Dr. Sarkar holds a doctorate from Colombia University and, since 2001, has been a Professor of Finance and Business at McMaster University in Hamilton, Ontario obtaining full tenure in 2004. He was able to teach in Canada on the basis of a work permit issued to him. He is earning an annual salary of approximately $120,000.00 with bonuses and made his application for permanent residence on February 10, 2003 through the Consulate General of Canada in Buffalo in the category of the skilled worker class pursuant to section 70(2)(b) of the *Regulations*. His application included his spouse and dependant daughter Konika.

[8] But for the Immigration Officer's determination in respect of Konika, it is clear his application for permanent residence to Canada would have been successful.

[9] I summarize the material events in the history of the treatment of his application:

1. As noted, his application for permanent residence was received at the Canadian Consulate in Buffalo, New York on February 10, 2003;

2. Konika was examined by a medical doctor who on March 1, 2004 advised Health Services Branch at Citizenship and Immigration Canada in Ottawa (CIC) further medical testing by a development paediatrician was required because of her possible medical condition (i.e. PDD: Autism);

3. That consultation took place on September 16, 2004. The paediatrician confirmed Konika's diagnosis and indicated she still needed an educational assistant "but this is likely to be withdrawn in view of her improvement." He added it was likely her behavioural problems were related to adjustment issues and therefore she might have a good prognosis and not require further resources;

4. On October 26, 2004 the reviewing medical officer at Health Services of CIC in Ottawa prepared a medical notification to the effect Konika's condition might reasonably be expected to cause excessive demand on social services because she required an individual education plan and additional support in the form of an educational assistant. Her notification indicated that Konika was inadmissible under section 38(1)(c) of the *Act*;

5. The reviewing medical officer received additional information during the last few months of 2004 which caused her to withdraw her assessment of Konika's inadmissibility under section 38 of the Act and to seek additional medical input. She so advised the Canadian Consulate in Buffalo and the applicant was asked for additional medical reports on Konika.

6. Both the reviewing medical officer and the Canadian Consulate in Buffalo received additional medical input and also received a submission from the Sarkar family legal counsel, Howard Eisenberg, dated the 31st of January 2005 from which I extract two paragraphs:

> "Dr. Sarkar and his family are totally committed to their children. Konika attends speech therapy and occupational therapy. These services are not covered by the Province of Ontario. Dr. Sarkar pays these costs privately. Speech therapy costs $110.00 per hour and OT is about $80.00 per hour. You will see from the report of the OT that the benefits for Konika are numerous for participating in these programs. Dr. Sarkar advises that the need for Konika's participation in these programs in decreasing, but he still funds her participation because of the enormous social benefits and stimulation that his daughter receives.
>
> Prior to attending public school, Dr. Sarkar funded day care for Konika privately. Dr. Sarkar is employed by McMaster University in Hamilton, Ontario as a tenured professor in the Business school. He earns approximately $117,500.00. He is fully able and agreeable to fund any of the social services to help his daughter." [Emphasis mine]

7. Another letter received is dated December 21, 2004. It is from the Head of the Division of Child Psychiatry at McMaster University. He states Konika suffers from a chronic lifelong condition but this does not mean her condition will not improve over time. He confirms while she does have an

> educational assistant, it is anticipated she will not require one the next two or three years. He said she sees him on average once a year "which is hardly a drain on the Canadian health care system." He confirms she has no other need for health services.

8. Another letter received is from Konika's Occupational Therapist (OT) dated January 11, 2005. The OT confirms since October 2001, she has been hired privately by Dr. Sarkar who also paid her privately to consult with staff at Konika's pre-school and on one occasion at her current school. The OT attested to Konika's progress.

9. On August 11, 2005, the reviewing medical officer, after studying all of the additional information received, prepared a new medical notification in which she determined Konika was inadmissible under section 38(1)(c) of the *Act* because Konika had a health condition "that might reasonably be expected to cause excessive demand on social services." She added "specifically, this medical condition might reasonably be expected to require services, the cost of which would likely exceed the average Canadian per capita cost over five years." The reviewing medical officer acknowledged Konika was diagnosed with Pervasive Development Disorder of moderate degree. She added the following:

> "<u>She currently benefits from speech therapy, occupational therapy and, an individual educational plan and teaching assistant. The reviewing medical officer wrote "the assessing specialist states that although this condition is a chronic life-long condition, improvement is possible over time</u>

> especially in social and communication skills. He anticipates that an educational assistant will not be required in the next two to three years. She has made significant progress due to her school and home program and her very supportive family. In a school report it is indicated the amount of direct support presently needed, will decrease in time.
>
> …this applicant suffers from a chronic life-long condition. She requires and will continue to require special educational services. She would likely benefit from speech therapy and occupational therapy. These services are expensive …" [Emphasis mine]

[10] Medical officer Waddell deposed an affidavit setting out his estimate of the extra educational costs attributable to Konika. He identified two intensive student allocations (ISA) under Ontario's special education grants at levels 2 and 3 of $12,000.00 and $27,000.00 per year respectively less normal student costs in grade school of $3,885.00.

[11] Dr. Waddell also indicated Konika would be eligible for development disability at home and identified adult day programs and vocational training costs, which in my view, may or may not be relevant given the only extra costs on the record absorbed by public funds are her special educational plan and her teaching assistant costs.

[12] The record also indicates Dr. Sarkar paid for Konika's pre-public school daycare and she has been in the public school system for four years now, first on a part-time basis and recently on a full-time basis.

***ANALYSIS***

[13] Counsel for the Respondent argues there are two recent cases decided by my colleagues which are directly on point namely: *Newton–Juliard* v. *Canada (Minister of Citizenship and Immigration)* 2006 FC 177 decided by my colleague Justice Tremblay-

Lamer and *Kirec* v. *Canada (Minister of Citizenship and Immigration)* 2006 FC 800 decided by my colleague Justice Blais.

[14] In both of those cases, my colleagues stated the standard of review in respect of an Immigration Officer's decision on grounds of medical inadmissibility in the context of an application for permanent residence status was correctness. I adopted that standard here.

[15] In *Newton-Juliard*, above, Justice Tremblay-Lamer expressed the thrust of the *Hilewitz* case to be as follows at paragraphs 22 and 23 of her reasons for judgment:

> 22 The Supreme Court determined that the financial situation of the families of the handicapped dependants was a relevant factor in assessing the potential impact of the admission of those persons on social services (*Hilewitz, supra*, paragraph 40). Therefore, the visa officers erred in confirming the medical officers' refusal to take into account the potential impact of the families' willingness and ability to assist (*Hilewitz, supra*, paragraph 70).
>
> 23 Madam Justice Abella, writing for the Court, observed that an analysis of the history of the relevant statutory provisions indicates that Parliament had intended to pass from an exclusionary policy based on classes to a policy requiring individual assessments (*Hilewitz, supra*, paragraph 53). The visa officer must determine whether there is a "reasonable likelihood" that the applicant's health condition would cause or might reasonably be expected to cause excessive demand on Canadian social services. To determine the demand realistically, the applicant's ability and intention to assume the costs of social services must be considered (*Hilewitz, supra*, paragraph 54).

[16] On the facts of the case before her, Justice Tremblay-Lamer wrote as follows:

> 24 At the time that they filed their application, Hilewitz and de Jong had both expressed their intention to register their children in private schools offering special education, which made it unlikely that there would be recourse to services financed by the State. Mr. Hilewitz also expressed the intention to acquire a business that would ensure employment for his son, which would eliminate the need to resort to professional training. In *Hilewitz*,

> the visa officer herself acknowledged that it was "highly unlikely" that the Hilewitz family would use services financed by the State. In this case, contrary to the above-mentioned matters, the applicant registered her in a public school as soon as she arrived in Canada. With respect to the services required in the future, contrary to the case of Hilewitz and de Jong, the applicant did not submit that she intended to call on the private education system. [Emphasis mine]
>
> 25 I dismiss the applicant's argument to the effect that her daughter would not now be an excessive demand on the basis that Djéna's school is a public school financed by the municipality of Montréal as well as income tax. Even in the event that the school were exclusively financed by the municipality it is nonetheless a school financed with public funds. The evidence in the record provided by the two affidavits of Dr. Gollish establish that the excessive costs of the services required for Djéna are now in the neighbourhood of $15,000. Further, taking the applicant's volunteer work at the school into account, as the applicant suggests, is purely speculative since nothing in the evidence would have allowed Dr. Gollish to quantify the time that she allots to it.
>
> 26 In short, the medical officer proceeded with an individualized assessment of Djéna's condition by assessing the nature, the gravity and the likely duration of her condition while taking into account the availability and cost of services offered by the State.
>
> 27 Based on the foregoing, I am persuaded that she considered all of the factors deemed relevant by the Supreme Court in assessing excessive demand.

[17] In *Kirec*, above, Justice Blais quoted from Justice Tremblay-Lamer's decision in *Newton-Juliard*, above, and stated this at paragraph 24 of his reasons.

> 24 Justice Tremblay-Lamer differentiates *Hilewitz* from *Newton- Juliard* by noting that the applicant in the latter was in the process of using public social services and did not mention any intention to cease doing so. As such, Justice Tremblay-Lamer concluded that, based on the evidence submitted, the applicant would place excessive demand on social services. [Emphasis mine]

[18] Justice Blais then concluded:

> 26 In the present matter, the applicant's daughter had a long history of using social services while living in Canada. Furthermore, the applicant never made any submissions to the effect that his daughter would not place an

> excessive demand on such services if the family were to move back to Canada from the United States. The visa officer clearly took into consideration the personal circumstances of the applicant's daughter. As such, the visa officer did not err rejecting the applicant's application for permanent residence based on the medical inadmissibility of his daughter. [Emphasis mine]

[19] I conclude this judicial review application must be allowed. Unlike *Newton-Juliard* and *Kirec*, above, the applicant in the case before me expressed through his counsel a willingness and ability to pay for any social services to help his daughter.

[20] As I see it, there is nothing in the record to support the conclusion that either the Medical Officer or the Immigration Officer considered, as they had to, the willingness and ability of Dr. Sarkar to defray the above average educational costs, past, present and in the future Konika would demand.

[21] Also, there is nothing in the record to support the conclusion that either the Medical Officer or the Visa Officer considered the extent to which, in the past, Dr. Sarkar privately funded Konika's pre-school costs and currently pays privately for her OT and speech therapy costs as well as some developmental costs at home.

[22] In this context, the IO should have examined the applicability of Ontario legislation such as the *Developmental Services Act* about which Justice Abella had this to say in *Hilewitz*:

> 69 Social services are regulated by provincial statutes. In Ontario, the province in which both the Hilewitz and de Jong families have expressed their intention to live, the *Developmental Services Act*, R.S.O. 1990, c. D.11,

> as amended, addresses some of the facilities, assistance and services that may be provided to a person with developmental disabilities. Section 15 of the regulations under the [page734] *Developmental Services Act Regulations*, R.R.O. 1990, Reg. 272, states that a determination will be made as to the ability of the applicant for "admission to [a] facility and for assistance" to contribute "to all or any part of the cost" thereof. Section 16 extends the same approach to applications for "services". The Ontario legislation manifestly contemplates the possibility of financial contributions from families able to make them. Even if the Hilewitz and de Jong families' stated intentions regarding education and training did not materialize, the financial resources of both families are such that they likely would be required to contribute a substantial portion, if not the entirety, of the costs associated with certain social services provided by the province. [Emphasis mine]

[23] I conclude by stating the record, in the case before me, was sufficiently clear to trigger the obligation to consider Dr. Sarkar's willingness and ability to absorb the excessive demand costs which Konika would attract. This they failed to do.

[24] Having come to this conclusion, it is not necessary for me to address counsel for the applicant's second submission that the authorities misapprehended the evidence on the issue of Konika's future needs for special educational services.

**JUDGMENT**

This judicial review application is allowed, the Immigration Officer's decision of October 19, 2005 is set aside and Dr. Sarkar's application for permanent residence in Canada with his wife and daughter is to be reconsidered by a different Immigration Officer.

"François Lemieux"
Judge

## APPENDIX A

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

38. (1) A foreign national is inadmissible on health grounds if their health condition (a) is likely to be a danger to public health;(b) is likely to be a danger to public safety; or (c) might reasonably be expected to cause excessive demand on health or social services.
Exception
(2) Paragraph (1)(c) does not apply in the case of a foreign national who (a) has been determined to be a member of the family class and to be the spouse, common-law partner or child of a sponsor within the meaning of the regulations;
(b) has applied for a permanent resident visa as a Convention refugee or a person in similar circumstances; (c) is a protected person; or (d) is, where prescribed by the regulations, the spouse, common-law partner, child or other family member of a foreign national referred to in any of paragraphs (a) to (c).

***Immigration et la protection des réfugiés, Loi sur l'***
***2001, ch. 27***

38. (1) Emporte, sauf pour le résident permanent, interdiction de territoire pour motifs sanitaires l'état de santé de l'étranger constituant vraisemblablement un danger pour la santé ou la sécurité publiques ou risquant d'entraîner un fardeau excessif pour les services sociaux ou de santé.
Exception
(2) L'état de santé qui risquerait d'entraîner un fardeau excessif pour les services sociaux ou de santé n'emporte toutefois pas interdiction de territoire pour l'étranger :a) dont il a été statué qu'il fait partie de la catégorie « regroupement familial » en tant qu'époux, conjoint de fait ou enfant d'un répondant dont il a été statué qu'il a la qualité réglementaire;b) qui a demandé un visa de résident permanent comme réfugié ou personne en situation semblable;c) qui est une personne protégée;d) qui est l'époux, le conjoint de fait, l'enfant ou un autre membre de la famille — visé par règlement — de l'étranger visé aux alinéas a) à c).

***Immigration and Refugee Protection Regulations***

SOR/2002-227

***Règlement sur l'immigration et la protection des réfugiés***

DORS/2002-227

“excessive demand”
« fardeau excessif »

“excessive demand” means

(a) a demand on health services or social services for which the anticipated costs would likely exceed average Canadian per capita health services and social services costs over a period of five consecutive years immediately following the most recent medical examination required by these Regulations, unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is no more than 10 consecutive years; or

(b) a demand on health services or social services that would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada as a result of the denial or delay in the provision of those services to Canadian citizens or permanent residents. (fardeau excessif)

“health services”
« services de santé »

“health services” means any health services for which the majority of the funds are contributed by governments, including the services of family physicians, medical specialists, nurses, chiropractors and physiotherapists, laboratory services and the supply of pharmaceutical or hospital

« fardeau excessif »
“ excessive demand ”

« fardeau excessif » Se dit :

a) de toute charge pour les services sociaux ou les services de santé dont le coût prévisible dépasse la moyenne, par habitant au Canada, des dépenses pour les services de santé et pour les services sociaux sur une période de cinq années consécutives suivant la plus récente visite médicale exigée par le présent règlement ou, s’il y a lieu de croire que des dépenses importantes devront probablement être faites après cette période, sur une période d’au plus dix années consécutives;

b) de toute charge pour les services sociaux ou les services de santé qui viendrait allonger les listes d’attente actuelles et qui augmenterait le taux de mortalité et de morbidité au Canada vu l’impossibilité d’offrir en temps voulu ces services aux citoyens canadiens ou aux résidents permanents. (excessive demand)

«  services de santé  »
“ health services ”

« services de santé » Les services de santé dont la majeure partie sont financés par l’État, notamment les services des généralistes, des spécialistes, des infirmiers, des chiropraticiens et des

care. (services de santé)

physiothérapeutes, les services de laboratoire, la fourniture de médicaments et la prestation de soins hospitaliers. (health services)

“social services”
« services sociaux »

« services sociaux »
“ social services ”

“social services” means any social services, such as home care, specialized residence and residential services, special education services, social and vocational rehabilitation services, personal support services and the provision of devices related to those services,

(a) that are intended to assist a person in functioning physically, emotionally, socially, psychologically or vocationally; and

(b) for which the majority of the funding, including funding that provides direct or indirect financial support to an assisted person, is contributed by governments, either directly or through publicly-funded agencies. (services sociaux)

« services sociaux » Les services sociaux — tels que les services à domicile, les services d’hébergement et services en résidence spécialisés, les services d’éducation spécialisés, les services de réadaptation sociale et professionnelle, les services de soutien personnel, ainsi que la fourniture des appareils liés à ces services :

a) qui, d’une part, sont destinés à aider la personne sur les plans physique, émotif, social, psychologique ou professionnel;

b) dont, d’autre part, la majeure partie sont financés par l’État directement ou par l’intermédiaire d’organismes qu’il finance, notamment au moyen d’un soutien financier direct ou indirect fourni aux particuliers. (social services)

Assimilation au conjoint de fait
(2) Pour l’application de la Loi et du présent règlement, est assimilée au conjoint de fait la personne qui entretient une relation conjugale depuis au moins un an avec une autre personne mais qui, étant persécutée ou faisant l’objet de quelque forme de répression

pénale, ne peut vivre avec elle.

FEDERAL COURT

Names of Counsel and Solicitors of Record

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|---|---|
| DOCKET: | IMM-7552-05 |
| STYLE OF CAUSE: | Sudipto Sarkar<br>v.<br>The Minister of Citizenship and Immigration |
| PLACE OF HEARING: | Toronto, Ontario |
| DATE OF HEARING: | December 6, 2006 |
| REASONS FOR JUDGMENT AND JUDGMENT: | Lemieux J. |
| DATED: | December 28, 2006 |

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