Federal Court  Cour fédérale

Date: 20100702

Docket: IMM-2173-09

Citation: 2010 FC 723

Ottawa, Ontario, July 2, 2010

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

GURMUKH SINGH PARMAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is a case of medical inadmissibility to Canada, on grounds of excessive demand for social services and does not deal with excessive demand for health services. In this judicial review application, Gurmukh Singh Parmar (the applicant) challenges the April 21, 2009 decision of Designated Immigration Officer Nimish Gautam of the Canadian High Commission in New Delhi (the Visa Officer) who denied his application for permanent residence in Canada on the sole ground

his dependant son Inderjot, then age 19, was medically inadmissible pursuant to paragraph 38(1)(*c*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA] being of the view that Inderjot's health condition, severe mental retardation with spastic cerebral palsy (which is not disputed by the applicant), might reasonably be expected to cause excessive demand on social services in Canada.

[2] What is principally challenged by the applicant is the need for some social services which the Visa Officer took into account in determining excessive demand in this particular case. Simply put, the applicant argues his son's health condition is such that publicly funded long term care, social worker/medical coordinator, speech language therapist and physiotherapy are of no use to him and he has never required them in the past. What needs he has have been and will continue to be provided to him by home care. Since birth his son cannot speak, has never been to school, has never walked, is confined to bed, has the mental age of six months, has an IQ below 20 and is completely dependant of others (namely his mother) for his every need: eating, dressing and change of diapers because he is incontinent.

[3] "Excessive demand", "social services" and "health services" are defined terms and are set out in section 1 of the *Immigration and Refugee Protection Regulation*, S.O.R./2002-227, [IRPR] which is reproduced in the annex to these reasons as the relevant legislative and regulatory provisions.

[4] As will be seen, the focus of the arguments in this case turn on the proper application of the teachings by the Supreme Court of Canada in *Hilewitz v. Canada (Minister of Citizenship and*

Immigration); De Jong v. Canada (Minister of Citizenship and Immigration), 2005 SCC 57, [2005] 2 S.C.R..706 [*Hilewitz*], which interpreted section 19(1)(*a*)(ii) of the former *Immigration Act*, a provision which is substantially the same as paragraph 38(1)(c) of the *IRPA* (*Hilewitz* at paragraphs 3, 59 and 60), to require medical officers, when determining medical inadmissibility in situations where there may be excessive demand for social services (not health services), to take into account both medical and non-medical factors including "the availability, scarcity or cost of publicly funded services along with the willingness and ability of an applicant or his family to pay for social services" (*Hilewitz* at paragraph 55). Moreover, the Court also held the resources of the family could not be disregarded in determining whether their disabled child would create an undue burden on Canada's social services. Private special education training paid for by an applicant for permanent residence as well as at home care provided by the family are two such relevant factors for this determination.

[5] Counsel for the applicant challenges the Visa Officer's decision on two main grounds. First, he argues the Visa Officer erred in accepting Dr. Leblanc's opinion (the Medical Officer) that Inderjot's health condition would create an excessive demand on social services as that opinion was not individually particularized to Inderjot's social services needs. The second ground to his challenge relates to the Visa Officer's finding the applicant, his wife and the members of the family or relatives in Canada, do not have the financial ability to offset any social services which Inderjot's health condition would otherwise create on his demand for social services. He argues the Visa Officer's exceeded his statutory authority in making that finding or, in the alternative, this finding is unreasonable and contrary to the evidence.

[6] This is the applicant's second judicial review application on this issue of the family's inadmissibility for permanent residence in Canada because of Inderjot's health condition. He had challenged in this Court, in May of 2005, a finding of inadmissibility by a different visa officer. That first decision was rendered by the visa officer before the Supreme Court of Canada had released its decision on October 21, 2005 in the *Hilewitz* case. The applicant's first judicial review application was settled between the parties such that the visa officer's April 2005 decision was quashed and the applicant's application for permanent residence was returned to a new visa officer for redetermination with the right of the applicant to make a new fairness response to a new fairness letter issued by the Medical Officer in order to take into account the teachings in *Hilewitz*.

II. The Visa Officer's decision

[7] There are two parts to the Visa Officer's decision. As will be seen, the first part is the refusal letter of April 21, 2009 which the Visa Officer sent to the applicant. That letter adopts Dr. Leblanc's medical opinion. It reads:

> The medical officer has determined that your family member Inderjot Singh Parmar has the following medical condition or diagnosis:
>
> > Mental Retardation – Severe
> > This 18 year old applicant, born January 9, 1990, was diagnosed as having Severe Mental Retardation with spastic cerebral palsy. Using standard clinical psychology tests, it is estimated that his IQ is below 20 with a mental age of 6 months. He is confined to the bed and is completely dependent on others for all activities of daily living including feeding, dressing, hygiene and mobility. The clinical psychologist indicates that his mental condition will persist throughout his life and he will require ongoing support and supervision.
> >
> > In the Canadian context, this applicant and his family would require a comprehensive assessment and review by a multi-disciplinary developmental team to establish and then implement

an appropriate interventional program to deal with his medical issues and address his adaptive skills deficiencies. This team would likely include physicians experienced in dealing with mentally retarded and physically handicapped individuals, speech specialists to help him with his language skills. As appropriate, occupational therapists, physiotherapists, special education specialists, psychologists, and social workers would be utilized. In Canada, he would be recognized as requiring special education and support.

The Canadian social philosophy has a commitment to equality, full participation and maximum community integration of all individuals with mental retardation and physical handicaps in order to maximize their personal development. This applicant and his family would be eligible for a variety of social services and benefits that would promote his relative autonomy. He will require physiotherapy and home nursing care. As well, his supportive family would be eligible for parent/caregiver relief programs and respite care. Withdrawal of family support would result in the applicant requiring institutional care. His requirement for the above mentioned multi-disciplinary review and management and supportive services are expensive and cost more than the average amount spent on individual health care in Canada.

Based upon my review of the results of this medical examination and all the reports I have received with respect to the applicant's health condition, I conclude that he has a health condition that might reasonably be expected to cause excessive demand on social services. Specifically, this health condition might reasonably be expected to require services, the costs of which would likely exceed the average Canadian per capita costs over 5 years. The applicant is therefore inadmissible under Section 38(1)(c) of the *Immigration and Refugee Protection Act*.

By letter dated November 28, 2008 you were advised that you may submit additional information relating to this medical condition or diagnosis. Additional information and documents provided by you were forwarded to our medical officer. After review, the medical officer concluded that there are no changes in the medical assessment and confirmed the finding of inadmissibility.

[Emphasis added]

[8] The Visa Officer also states:

> I am satisfied that the medical officer's opinion about your family member's Inderjot Singh Parmar inadmissibility on health grounds is reasonable. Accordingly, your accompanying family member Inderjot's Singh Parmar is inadmissible pursuant to section 38(1)(c) in that your accompanying family member's Inderjot Singh Parmar condition might reasonably be expected to cause excessive demand on health or social services.
>
> [Emphasis added]

[9] The second part of the Visa Officer's decision deals with the applicant's willingness or intent to offset the excessive demand and his financial ability to do so. The Visa Officer's decision on this aspect is contained in his Computer Assisted Immigration Processing System (CAIPS) Notes which is an integral part of the impugned decision.

[10] The Visa Officer first set out the reasons why he was not satisfied of the applicant's plan or intent to offset the excessive demand. He specifically stated the plan was not credible on the following basis:

a. As to the applicant's assertion his wife will stay home to look after Inderjot, he determined that it is "not likely" his wife will stay home once in Canada since, in the past, she had operated a computer training company;
b. He dismissed the applicant's suggestion the services of a family doctor in Canada will be all that is necessary to take care of Inderjot being of the opinion the medical assessment clearly indicated Inderjot's need for specialized medical doctors;
c. He gave no weight to the applicant's statement his relatives in Alberta will give the applicant a house where Inderjot's care will be provided for by his wife and if need be by his relatives in Alberta where he had been offered employment as a

purchasing agent by his brother. Specifically, the applicant asserts that his sister, Kulwant Kaur, who currently looks after her grandchildren, will assist in looking after Inderjot. The Visa Officer said there was no indication of Ms. Kaur qualifications or experience in taking care of "mentally retarded and physically handicapped individuals".

d. The applicant also asserted that because there is no treatment for cerebral palsy in Canada there would be no demand on social services and noting the applicant had referred to letters from doctors and medical services in Canada dated 1991, and 1993. He rejected this evidence because they did not address the question of how Inderjot will be supported through services and supervision.

[11] For the following reasons, the Visa Officer also found that there was insufficient evidence provided in regard to the applicant's financial ability to offset excessive demand.

[12] Valuation reports of two houses and a plot of land were submitted but he noted these were not ownership documents. Furthermore, it appeared the properties referenced are held under joint ownership so the applicant would not be able to sell them easily.

[13] The car was not an asset because the evidence indicated it was not in the applicant's name so ownership could not be attributed to the applicant.

[14] There was insufficient evidence of history of the applicant's financial relationship with the Bank of India, First Calgary Savings and Union Ltd., and Canada Trust. In particular, he found there

was no explanation for recent deposits of money. He concluded the balances could have been inflated for the purpose of his application for permanent residence

III. The process leading to the impugned decision

[15] On November 28, 2008, the Visa Officer sent a Fairness Letter to the applicant setting out Inderjot's health condition and its potential impact on social services. The content of the Fairness Letter is substantially the same as set out in the Visa Officer's subsequent refusal letter. However, in the Fairness Letter, the Visa Officer told the applicant that in consultation with the Health Management Branch of Citizenship and Immigration Canada (CIC), it had determined that the following social services would be required:

> Publicly funded long term care in Alberta and subsidized through Regional Health Authorities based on an income/asset test. Information available for 2007 indicates that individuals would be eligible for subsidies ranging from $10,584 to $25,416 annually.
> Other needs for this child with variable costs are:
> - Social worker/Medical coordinator
> - Speech language therapist
> - Physiotherapy
>
> [Emphasis added]

[16] The Fairness Letter contains two paragraphs of a more generalized nature which were reproduced in the refusal letter quoted at paragraph 7 of these reasons. The first paragraph begins with the words "In the Canadian context" and the second paragraph with the words "The Canadian social philosophy".

[17] The Visa Officer indicated to the applicant he had an opportunity to submit additional information that addressed any or all of the following:

- The medical condition(s) identified;
- Social services required in Canada for the period indicated above;
- Your individual plan to ensure that no excessive demand will be imposed on Canadian social services for the entire period indicated above and;
- Your signed Declaration of Ability and Intent.

[Emphasis added]

adding:

> In order to demonstrate that you/your family member will not place an excessive demand on social services, if permitted to immigrate to Canada, your must establish to the satisfaction of the assessing officer that you have a reasonable and workable plan, along with the financial means and intent to implement this plan, in order to offset the excessive demand that you would otherwise impose on social services, after immigration to Canada.

[18] At this juncture, I propose to make some general observations regarding the structure of the letters and in particular the language used by the Visa Officer. The services identified by the Visa Officer in the Fairness Letter, reproduced at paragraph 15 of theses reasons, seem to have been very specific to Inderjot. However, any value in identifying these services was entirely lost because both the Fairness Letter and the final refusal letter are couched in unfocused and generalized language which purport but fails to specify upon which required services Inderjot will cause excessive demand. All of this generalized language was extracted from the Medical Notification, included as annex to these reasons, of Dr. J.B. Lazarus (the Medical Officer who provided the 2005 medical opinion which was the subject of the discontinued judicial review proceeding).

[19] Consequently, I found the structure of the decision very confusing, as did Mr. Parmar. This generalized language used by Dr. Lazarus does not conform with *Hilewitz* as it is clearly not particularized to the individual and should be avoided in the future.

[20] The applicant responded on January 23, 2009. He enclosed a declaration under oath of ability and intent in the form set out as suggested by the Visa Officer (Certified Tribunal Record (CTR), page 53). He declared he would assume responsibility for arranging the provision of any required social services and provided a statement why he did not intent to use any of the specified social services. He enclosed financial documents. He also declared that should at any time social services be required he intended to pay for them privately and declared he would not hold the federal, provincial or territorial governments responsible for costs associated with the provision of social services. In his response, he did not take issue with the medical diagnosis of Inderjot's health impairment. He relied on the medical information provided in the context of the first medical notification in 2005 was, as noted, led to a first judicial review that settled.

[21] In the balance of his declaration, the applicant commented on all the services mentioned (be they identified as social services by the Visa Officer or not) in the Fairness Letter sent to him on November 28, 2009 (see CTR, pages M-10 to M-14). In summary, he stated:

> A. Inderjot has had only one doctor since he was born, Dr. Singh, a child specialist. He identified a family doctor in Calgary who will take on the entire Parmar family as patients. He stated Inderjot did not require more than one doctor in India and will not require any specialized medical services or doctors in Canada. He is healthy and does not take any medicines (CTR, page 76).

B. There is no need for speech specialist or therapist. He understands Punjabi and communicates by way of gestures. He cannot speak and does not understand English. The family has never had resort to speech specialist or therapists before and it is too late now as he is 19.

C. There is no need for an occupational therapist. His son is bedridden and cannot move independently; occupational therapy will not help him; he has never had this kind of treatment in the past and there is no intention to have one in the future.

D. In terms of a physiotherapy, the applicant indicates this was tried between 1991 and 1997 but was discontinued because it did not provide his son with any benefits and the sessions made his son very uncomfortable. He says he, his wife and his other son learned soft message which is administered each day and helps Inderjot. He has had no physiotherapist since 1997 and there is no intention to use one in the future.

E. As for special education specialist, the applicant indicates he has never been to school, is 19 and would not required to go to school in Alberta. He does not understand English and is uneducable. He will not require this service.

F. The only time he saw a psychologist was for his immigration medical examination. He does not need a psychologist and there is no intention to have one in Canada.

G. Inderjot has never had a social worker/medical coordinator and does not need them. The family doctor who is willing to attend to the family in Calgary will take care of his needs.

H. There is no need for home nursing care. Inderjot has always lived at home and the family has always looked after him; his culture dictates this. Moreover, in Calgary, there is a large extended family willing to assist him, if need be.

I. The family has never in the past required any relief from attending to Inderjot and has never accessed respite care. There is no intention to do so in the future. The extended family is there to help if help is needed for he and his wife. He notes his wife and Inderjot in 2004 visited Canada for 6 months. Everything went well. His wife looked after him by herself. Inderjot did not need medical or social services during that trip. Inderjot enjoyed his relatives as they him.

J. The applicant asserted there will always be family support for Inderjot as it "is foreign to our culture to institutionalized family member". He indicates should anything happen to him and his wife, his older son is committed to looking after his brother plus the fact his extended family in Calgary (a sister and two brothers) are there to assist.

K. In sum, the applicant concludes that the family currently does not use any social services in India and does not intend to use them here. He believes that all that Inderjot needs is care and attention by his family which they will continue to provide him with. He adds that although his son is confined to bed and has cerebral palsy, he is otherwise very healthy young man. He has no seizures or other complications.

[22] The applicant concludes his declaration by referring to his financial circumstances. He has a job with his brother's company as soon as he immigrates to Canada with his family. He has savings in GIC's of $109,000 CDN on deposit in Canada and over $28,800 CDN in banks in India plus fixed assets there of approximately $352, 000 CDN. He has a house to live in Calgary owned by his brother Inderji who has purchased another house. He speaks of his extended family and states his wife will stay at home and look after Inderjot as she does today in India.

[23] He concludes, by deposing under oath, his son will not create an excessive demand on social services in Canada and, if required to use them, he will pay for them privately as "I have the money to do so".

[24] I make reference here to a letter missing from the Certified Tribunal Record (CTR). Counsel for the applicant pointed out that while Mr. Parmar had made submissions as to his ineligibility to receive long-term care in Alberta because of the specific funding formula, the Visa Officer fails to respond to that point. Notably, these submissions presented by way of letter were missing from the CTR.

[25] On February 27, 2009 (CTR, page M-2), the Medical Officer Monique-Louise LeBlanc wrote a short three paragraph note under the heading "Procedural Fairness" indicating she had reviewed the responding material sent by the applicant (his covering letter, his declaration of Ability and Intent in prescribed form (see CIC's Operational Bulletins 063, September 24, 2008) and details of funds and assets). She stated in the third paragraph of her note she had reviewed the medical file along with the material listed above (the three documents) and "it is my opinion that no information has been provided which would indicate that the original medical assessment was incorrect. Therefore, there is insufficient evidence to support a change or re-evaluation of Inderjot's medical assessment at this time. Hence he remains M5".

IV. The teachings in *Hilewitz*

[26] The *Hilewitz* case and its companion case in *De Jong*, above, were situations dealing with applicants for permanent residence to Canada in the investor and self-employed classes where both

applicants had met the financial requirements attached to those classes but were denied permanent resident status on account of a dependent's child's health condition (mild mental retardation) where medical officers at the CIC had concluded, under section 19 of the former *Immigration Act*, the child's admission to Canada "would cause or might reasonably be expected to cause an excessive demand on Canadian social services" a statutory provision, as noted, with is substantially similar to now paragraph 38(1)(*c*) of the IRPA.

[27] In both cases, the applicants argued the dependent child suffered from intellectual disabilities at birth which medical officers at CIC assessed would require special education, vocational training and respite care for the caregivers. Both applicants indicated in response to the fairness letter they would send their child to private school providing special education and pay the required cost. It followed, they submitted, there would be no demand on social service much less any excessive demand.

[28] In *Hilewitz*, the Supreme Court of Canada allowed an appeal from a decision of the Federal Court of Appeal which reversed a decision of my colleague Justice Frederick B. Gibson, who quashed a decision of a Visa Officer on the basis that, while parental resources and willingness to pay may be irrelevant in determining whether a disabled child's admission to Canada is likely to cause excessive demands on health service, the same could not be said of social services which are funded and delivered on a different basis. As a result, Justice Gibson held those two factors of ability and willingness to pay should have been considered by the Visa Officer who had omitted to do so. The Federal Court of Appeal was of the view that non-medical factors such as the availability

of family support and the ability and willingness of the family to pay were irrelevant considerations in determining whether excessive demand would be made on Canada's social services.

[29] Specifically at paragraph 25 of the *Hiliwitz* decision, Justice Rosalie Abella for the majority stated the Federal Court of Appeal had come to this conclusion because the Minister's denial of permanent residency on medical inadmissibility grounds reflected "a risk-adverse policy which takes into account the contingency that a family's financial situation could deteriorate, thereby creating a burden on Canadian social services" (emphasis added), a view which she rejected based on her reasons which may be summarized as follows.

[30] First, as a matter of statutory construction, Justice Abella took into account the legislative history of the predecessors of paragraph 38(1)(*c*) of the IRPA as well as the intent of Parliament as expressed in the legislative and regulatory scheme more particularly disclosed in the 1977 Minutes of Proceedings and Evidence of the Standing Committee of the House of Commons examining clause 19(1)(*a*)(ii) of the former *Immigration Act* as to the relevance of the issue as to whether a parent who keeps at home a disabled child will result in that child not placing demands on social services (see paragraph 52 in *Hilewitz*). Justice Abella then wrote the following at paragraph 54 to 57 of her reasons:

> 54 Section 19(1)(*a*)(ii) calls for an assessment of whether an applicant's health would cause or might reasonably be expected to cause excessive demands [page729] on Canada's social services. The term "excessive demands" is inherently evaluative and comparative. Without consideration of an applicant's ability and intention to pay for social services, it is impossible to determine realistically what "demands" will be made on Ontario's social services. The wording of the provision shows that medical officers must assess likely *demands* on social services, not mere eligibility for them.

> 55 To do so, the medical officers must necessarily take into account both medical and non-medical factors, such as the availability, scarcity or cost of publicly funded services, along with the willingness and ability of the applicant or his or her family to pay for the services.
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> 56 This, it seems to me, requires individualized assessments. It is impossible, for example, to determine the "nature", "severity" or probable "duration" of a health impairment without doing so in relation to a given individual. If the medical officer considers the need for potential services based only on the *classification* of the impairment rather than on its particular manifestation, the assessment becomes generic rather than individual. It is an approach which attaches a cost assessment to the disability rather than to the individual. This in turn results in an automatic exclusion for all individuals with a particular disability, even those whose admission would not cause, or would not reasonably be expected to cause, excessive demands on public funds.
>
> 57 The issue is not whether Canada can design its immigration policy in a way that reduces its exposure to undue burdens caused by potential immigrants. Clearly it can. But here the legislation is being interpreted in a way that impedes entry for all persons who are intellectually disabled, regardless of family support or assistance, and regardless of whether they pose any reasonable likelihood of excessively burdening Canada's social services. Such an interpretation, disregarding a family's actual circumstances, replaces the provision's purpose with a cookie-cutter methodology. Interpreting the [page730] legislation in this way may be more efficient, but an efficiency argument is not a valid rebuttal to justify avoiding the requirements of the legislation. The Act calls for individual assessments. This means that the individual, not administrative convenience, is the interpretive focus.
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> [Emphasis added]

[31] Second, the test to determine whether of the child's medical condition might reasonably be expected to cause excessive demand is to be gauged on the standard of "reasonable probability, not remote possibility. It should be more likely than not based on a family's circumstances that the contingencies will materialize". (*Hilewitz*, paragraphs 58 and 68)

[32] Specifically, Justice Abella found that a person can only be found to be ineligible for admission following an inquiry which excludes speculative contingencies such as possible bankruptcy, mobility, school closure and parental death. She wrote:

> 58 The clear legislative threshold provides that to be denied admission, the individual's medical condition "would" or "might reasonably be expected" to result in an excessive public burden. The threshold is reasonable probability, not remote possibility. It should be more likely than not, based on a family's circumstances, that the contingencies will materialize. See *Hiramen v. Minister of Employment and Immigration* (1986), 65 N.R. 67 (F.C.A.), and *Badwal v. Canada (Minister of Employment and Immigration)* (1989), 64 D.L.R. (4th) 561 (F.C.A.), both by MacGuigan J.A.
>
> 68 These views, it seems to me, undermine and contradict the direction in the legislation that a person can only be found to be ineligible for admission if his or her admission "would" or "might reasonably be expected" to cause excessive demands. That means that something more than speculation must be applied to the inquiry. The fears articulated in the rejections of the Hilewitz and de Jong applications, such as possible bankruptcy, mobility, school closure or parental death, represent contingencies that could be raised in relation to any applicant. Using such contingencies to negate a family's genuine ability and willingness to absorb some of the burdens created by a child's disabilities anchors an applicant's admissibility to conjecture, not reality.
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> [Emphasis added]

[33] Third, she noted social services are regulated by provincial statutes and there is distinction between health services and social services (see paragraphs 21 and 67).

[34] Justice Abella concluded:

> 70 The medical officers were obliged to consider all relevant factors, both medical and non-medical, such as the availability of the services and the anticipated need for them. In both cases, the visa officers erred by confirming the medical officers' refusal to account for the potential impact of the families' willingness to assist.

> Moreover, their failure to read the families' responses to the fairness letters sent to them by the medical officers meant that their decisions were not based on all the relevant available information.

IV. The standard of review

[35] Two recent Supreme Court of Canada decisions have impacted on the standard of review analysis which its previous jurisprudence had established. As is well known these decisions are : *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 and, in respect of federal tribunals, *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 [*Khosa*].

[36] *Dunsmuir* prescribes:

i. With the elimination of the previously recognized standard of patent unreasonableness, there are now only two standards of review: correctness and reasonableness;

ii. If previous jurisprudence has satisfactorily settled on a standard of review in a particular type of decision, a fresh standard of review analysis is not necessary;

iii. Where the question to be decided is one of fact, discretion or policy, deference will usually apply automatically which compels the application of the reasonableness standard as does the review of questions where the legal and factual issues are intertwined with and cannot be readily separated (see paragraph 53);

iv. The reasonableness standard means:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court

> conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of [page221] justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

v. The correctness standard applies where the reviewing court owes no deference to the decision-maker who must be right in its determination. Generally, the reviewing courts owe no deference where questions of law are determinative of the issue (matters of constitutionally, statutory interpretation, question of jurisdiction) and matter of procedural fairness.

[37] *Khosa*, above, is important to federal tribunals because of section 18.1(4)(*d*) of the *Federal Courts Act*, R.S. 1985, c.F-7, which provides that the Federal Court of Appeal or the Federal Court in the exercise of their original judicial review functions may set aside a decision of a federal tribunal if it "based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it".

[38] *Khosa* held that while this paragraph was not a legislated standard of review it nevertheless provided "legislated guidance as to the degree of deference owed to the [federal tribunal's] findings of fact" (*Khosa*, para. 4). Later on in his reasons, Justice Ian Binnie for the majority of his colleagues at para. 46 stated:

> More generally, it is clear from s. 18.1(4)(*d*) that Parliament intended administrative fact finding to command a high degree of deference. This is quite consistent with *Dunsmuir*. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the *Federal Courts Act*.

[39] The jurisprudence indicates that paragraph 18.1(4)(*d*) finds application where a tribunal findings of fact are (1) material but not rationally supported by any evidence (2) where on an assessment of the evidence as a whole a tribunal's findings are unreasonable (3) where its conclusion are speculative or conjectural and (4) where its findings did not have regard to the totality of the evidence before it or were made by ignoring material evidence.

V. Analysis

A. *Preliminary issue*

[40] At the beginning of the hearing I heard the applicant's motion to strike out the affidavit of Dr. Brian Dobie, sworn on November 24, 2009.

[41] Dr. Dobie is a physician licensed to practice medicine in Ontario. He has been a medical officer at Health Canada and at CIC but he was not the Medical Officer who provided the medical opinion in this case, although he did have some involvement in the first case which, as mentioned, was settled. Dr. Lablanc was unavailable to provide an affidavit as she was on sick leave at the time this judicial review was commenced. On reading Dr. Dobie's affidavit and after listening to the submissions of the parties, I indicated I would give little weight to the affidavit as being of marginal relevance and utility having regard to the CTR and to the fact his cost information was not based on Alberta costs where the Parmar family would live but rather on costs in Ontario and because medical costs are also factored in.

B. *Discussion and Conclusions*

[42] Counsel for the applicant raised a wide-ranging number of issues in seeking to quash the Visa Officer's decision. Some of these have been mentioned at paragraphs 2 and 5 of these reasons. He raises subsidiary grounds such as (1) the Visa Officer substituting his views on matters which had to be decided by the Medical Officer; (2) the mixing into social services what are properly defined as health services. It will not be necessary for me to deal with all of the submissions put forward by counsel for the applicant except for two grounds which are determinative: (1) a breach of procedural fairness in failing to provide adequate reasons and (2) unreasonable findings of fact in terms of ability and willingness of the applicant to mitigate excessive demand. In my view those findings are contrary to the evidence or were made on the basis of no evidence.

[43] As an aside, counsel for the applicant also appeared as counsel for Mr. Sapru, the applicant in the recent decision my colleague Justice Mosley in *Sapru v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 240 [*Sapru*] (heard on February 18, 2010 and decided on March 2, 2010). A review of Justice Mosley's decision, in which he dismissed the judicial review application on a medical inadmissibility case involving a dependant child with development delay, shows Mr. Cecil Rotenberg made the same arguments in *Sapru* as he did in front of me.

A. *Lack of adequate reasons*

[44] In recent decisions, the springboard of which is its decision in *Baker v. Canada*, [1999] 2 S.C.R. 825 [*Baker*], the Supreme Court of Canada has been emphasizing the need to issue reasons which are sufficient. See *Baker*, at paras. 35 to 44. *Baker* was a case where an immigration officer dismissed an application by Mrs. Baker to remain in Canada on humanitarian and compassionate grounds. The Court held that written reasons were necessary in that case because of the importance

significance of the decision on the individual with Justice Claire L'Heureux-Dubé writing for the Court at paragraph 43 that "it would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached".

[45] Recently in *R v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, [*R.E.M.*] the Chief Justice held that a trial judge's reasons serve three main functions in criminal law: (1) to explain the decision to the parties; (2) to provide public accountability and (3) to permit effective review which is to ensure that read in context of the record as a whole, the trial judge's reasons demonstrate that he or she was alive to and resolved the central issues before the Court.

[46] The test for sufficiency of reasons at paragraph 15 of *R.E.M.* is whether the reasons fulfill the three functions identified.

[47] *R.E.M.* was a criminal case. I see no reason why it should not be applied to an administrative law context since the Supreme Court of Canada advocated a functional approach first endorsed in *Baker*.

[48] I have no hesitation in finding the reasons of the Medical Officer to be far from adequate. The Fairness Letter was based on her medical notification. That letter invited a response on a number of issues including the social services required and an individual plan related to ability and willingness to ensure that no excessive demand will be imposed on Canadian social services.

[49] The applicant provided a detailed response on all points except on Inderjot's medical diagnosis. The Medical Officer acknowledged receiving and reviewing the material sent by Mr. Parmar. Without any analysis or comment the Visa Officer simply indicated that the applicant's Fairness response did not change her previously expressed view. The reasons were seriously deficient as they did not fulfill their functions of explaining why Mr. Parmar's submissions on the lack of need for social services were not accepted, providing public accountability and permitting effective judicial review. On the basis of these inadequate reasons, this Court simply does not know if the Medical Officer took into consideration the teachings in *Hilewitz* particularly on the need for an individualized assessment for Inderjot.

[50] In *Sapru*, Justice Mosley, at paragraph 38, on similar facts, readily concluded the Medical Officer's reasons on the non-medical evidence were insufficient. He did find, however, the Visa Officer had given detailed reasons for finding the applicants did not have the ability and intent to mitigate excessive demand. The question he posed was whether the Visa Officer's reasons saved the medical officers reasons. He found they did. On the facts before me I cannot arrive at the same conclusion because the Visa Officer's reasons on the non-medical elements are flawed. This is issue No.2.

B. *Issue No. 2*

[51] The reasons of the Visa Officer for rejecting on the one hand the plan put forward by Mr. Parmar as not being credible cannot withstand scrutiny; the findings are not reasonable and are made in violation of the legislative discretion contained in paragraph 18.1(4) of the *Federal Courts Act* as per *Khosa* for the following reasons.

[52] First, there is no evidentiary basis that Inderjot's mother will not stay at home in Canada to provide him home care as she has for the last several years. His finding is based on pure speculation. Contrast this finding with that of Justice Mosley in *Sapru* at paragraph 58 where he indicates a similar finding was reasonable because the person concerned had been continuously employed or self-employed continuously since 1992.

[53] Second, his finding that Inderjot will require specialized medical care is contrary to the evidence and is not supported by any evidence directly applicable to Inderjot's circumstances.

[54] He gave no weight to the sworn undertakings by family members. He does not explain why he did so except in the case of the applicant's sister who he finds not qualified without regard to the evidence provided that Inderjot does not need such care; his needs are that of a six month old infant.

[55] Third, the same can be said of the Visa Officer's assessment of the family's financial ability. (1) he finds the two houses in India are in joint ownership and would be difficult to sell. He omits or neglects to mention that in most cases, the joint owner is his wife (2) his criticism of banking arrangements is grounded in speculation. If he had a concern about recent increases in bank balances he should have asked the applicant rather than guessing they may be inflated for immigration purposes.

[56] On their face these banks balances and GIC investments were confirmed by bank statements which the Visa Officer did not doubt the veracity. The situation in this case is a far cry from the

situation in *Sapru* at paragraph 6 (no declaration of ability and intent submitted; information was deficient in the plan at paragraph 9; at paragraph 51 no found plan was submitted and what was indicated lacked of credibility at paragraphs 56 through 59).

[57] In closing, I also observe that Justice Mosley in *Sapru* at paragraph 49 agreed with counsel for the applicant "that it does not appear likely" that all of the social services identified in that case by the Medical Officer would be required. He however concluded that some important social services would be necessary which led him to conclude that the Medical Officer's overestimation was not material. Such is not the case here.

[58] For these reasons, I conclude this judicial review application is granted.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this judicial review application is allowed, the decision of the Visa Officer is set aside and the applicant's application for permanent residence is returned for determination by a different visa officer whose decision on Inderjot's medical inadmissibility shall take into account these reasons and be based on advise received from a different medical officer.

The redetermination shall be conducted forthwith pursuant to the following directives:

(1) Pursuant to instructions issued by the new Medical Officer (the M.O), Inderjot shall undergo a thorough and complete medical examination to determine his current state of health and whether his health has remained the same or has deteriorated since the last medical review.

(2) The M.O. shall issue a new Medical Notification identifying the anticipated services (health or social) Inderjot would likely require and whether the provision of those services would likely cause an excessive demand for health or social services in the intended province of residence in Canada keeping in mind that the source of the majority of the funding for services is contributed by governments.

(3) A new Fairness Letter shall be issued by the new Visa Officer to Mr. Parmar who shall be at liberty to respond to the elements set out in that letter. A plan to mitigate any excessive demand shall be provided which shall address issues raised in recent jurisprudence on the enforceability of undertakings to governments and alternative arrangements such as insurance policies to overcome enforcement limitations. Any

declaration of ability and intent shall contain updated financial information on the family's net worth.

(4) The M.O. shall examine forthwith Mr. Parmar's fairness response in compliance with recent jurisprudence and, in compliance with the requirements of procedural fairness, shall assess whether and in what means Mr. Parmar's fairness response impacted on the information identified in the fairness letter necessarily provided to him.

(5) The Visa Officer shall carry out his duties as required by law.

No certified question proposed.

"François Lemieux"
Judge

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Health grounds

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.

Loi sur l'immigration et la protection des réfugiés, L.C. 2001, ch. 27

Motifs sanitaires

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.

Immigration and Refugee Protection Regulations, SOR/2002-227

Definitions

1. (1) The definitions in this subsection apply in the Act and in these Regulations.

"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

Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227

Définitions

1. (1) Les définitions qui suivent s'appliquent à la Loi et au présent règlement.

« étudiant »
"student"

« étudiant » Personne qui est autorisée par un permis d'études ou par le présent règlement à étudier au Canada et qui étudie ou compte étudier au Canada.

« fardeau excessif »
"excessive demand"

« fardeau excessif » Se dit :

a) de toute charge pour les services sociaux ou les services de santé dont

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 an inability to provide timely services to Canadian citizens or permanent residents.

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.

"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 care.

« 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 physiothérapeutes, les services de laboratoire, la fourniture de médicaments et la prestation de soins hospitaliers.

"social services"
« services sociaux »

"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 1 related to those services,

(a) that are intended to assist a person

« services sociaux »
"social services"

« 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 :

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.

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.

Excessive demand

34. Before concluding whether a foreign national's health condition might reasonably be expected to cause excessive demand, an officer who is assessing the foreign national's health condition shall consider

(a) any reports made by a health practitioner or medical laboratory with respect to the foreign national; and

(b) any condition identified by the medical examination.

Fardeau excessif

34. Pour décider si l’état de santé de l’étranger risque d’entraîner un fardeau excessif, l’agent tient compte de ce qui suit :

a) tout rapport établi par un spécialiste de la santé ou par un laboratoire médical concernant l’étranger;

b) toute maladie détectée lors de la visite médicale.

2005 Medical Notification, Dr. J.B. Lazarus (Certified Tribunal Record, M129):

> This 15 year old applicant, born January 9, 1990, has Severe Mental Retardation and Cerebral Palsy. His estimated IQ is 22 placing him in the severe mental retardation range. His condition is complicated by cerebral palsy. He has spastic quadriparesis and is unable to sit, stand or speak. He is confined to bed and has marked spasticity with with flexion deformities of his arms and legs. He does not respond to verbal commands. He is completely dependent on others for all activities of daily living including feeding, dressing, hygiene and mobility. He is incontinent of urine and stool. His condition will persist throughout his life and the consultant psychologist states that he will require ongoing support and supervision.
>
> In the Canadian context, this applicant and his family would require a comprehensive assessment and review by a multi-disciplinary development team to establish and then implement an appropriate interventional program to deal with his medical issues and address his adaptive skills deficiencies. This team would likely include physicians experienced in dealing with mentally retarded and physically handicapped individuals, speech specialists to help him with his language skills. As appropriate, occupational therapists, physiotherapists, special education specialists, psychologists, and social workers would be utilized. In Canada, he would be recognized as requiring special education and support.
>
> The Canadian social philosophy has a commitment to equality, full participation and maximum community integration of all individuals with mental retardation and physical handicaps in order to maximize their personal development. This applicant and his family would be eligible for a variety of social services and benefits that would promote his relative autonomy. He would be eligible for programs focusing on the acquisition of basic living skills and special education. He will require physiotherapy and home nursing care. As well, his supportive family would be eligible for parent/caregiver relief programs and respite care. Withdrawal of family support would result in the applicant requiring institutional care. His requirement for the above mentioned multi-disciplinary review and management and supportive services are expensive and cost more than the average amount spent on individual health care in Canada.
>
> Based upon my review of the results of this medical examination and all the reports I have received with respect to the applicant's health condition, I conclude that he has a health condition that might reasonably be expected to cause excessive demand on social services, the costs of which would likely exceed the average Canadian per capita costs over 5 years. The applicant is therefore inadmissible under Section 38(1)(c) of the Immigration and refugee [sic] Protection Act.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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