Federal Court  Cour fédérale

Date: 20111122

Docket: IMM-925-11

Citation: 2011 FC 1336

Ottawa, Ontario, November 22, 2011

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

RONILO VELASQUEZ PEREZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision made on January 24, 2011 by Consul J. Seyler, the Visa Officer, denying the Applicant his permanent resident application because of the health condition of his dependent son, Carlos Niro Perez ("Carlos"). Relying on the Medical Officer's opinion, the Visa Officer found that Carlos, having been diagnosed with "profound sensorineural hearing loss", might reasonably be expected to cause excessive demand on health or social services. As a result, he was found to be inadmissible to Canada pursuant to ss. 38(1)(c) of

the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Pursuant to s. 42 of *IRPA*, Carlos' inadmissibility renders the remainder of his family inadmissible as well.

[2] For the reasons that follow, I have found that this application for judicial review must be granted. The Visa Officer erred in his assessment of the demand on social services that Carlos' health condition might reasonably be expected to cause, and also breached the Applicant's right to procedural fairness in failing to appropriately notify him of his concern.

1. Background

[3] Ronilo Velasquez Perez, the Applicant, was born on October 15, 1966 in Quezon City. He is a citizen of the Philippines. The Applicant and his wife, Arlene De Guzman Perez, have four children: Carlos, Patricia, Francesca and Ronielene. They were all born in the Philippines.

[4] The Applicant was an engineer in the Philippines. He is currently completing a professional engineering designation in Canada. He arrived in Canada in March 2007 on a temporary work permit. Since then, he has worked at WorleyParsons in Edmonton, a company specializing in delivering engineering, procurement and construction management services. The Applicant is currently the Business Unit Lead in piping design for WorleyParsons.

[5] On May 8, 2009, Mr. Perez submitted an application for permanent residence in Canada in the Provincial Nominee Class at the Consulate General of Canada, Immigration Regional Program Centre in Buffalo, New York. His application included his wife and his four children.

[6] Mr. Perez met the selection criteria, but that did not exempt him and his family members from meeting the admissibility requirements under *IRPA*. By letter dated January 5, 2010, the Visa Officer sent a procedural fairness letter to Mr. Perez. He was advised that he may be inadmissible on the ground that his family member, Carlos, is a person described in ss. 38(1) of *IRPA*, in that he is a person whose health condition might reasonably be expected to cause excessive demands on health or social services. He was provided with an opportunity to submit within 60 days any additional information and documents relating to his son's medical condition or diagnosis. Mr. Perez was also invited to "submit any information addressing the issue of excessive demand" if that applies to his case.

[7] In his affidavit, Mr. Perez states that his family first discovered that Carlos had a hearing impairment when they came to Canada in June 2008. He was diagnosed with a profound bilateral sensorineural hearing impairment. The Applicant discussed possible treatments for Carlos with the multi-disciplinary team of doctors and specialists at Glenrose Rehabilitation Hospital in Alberta, one of the major centres in Canada for Cochlear implantation. The Cochlear Implant team at Glenrose is a multi-disciplinary team of medical professionals, including speech language pathologists, educators of the deaf, audiologists, psychologists, social workers, ear nose and throat surgeons and pediatricians. Carlos was later assessed as a possible candidate for the surgery, and he successfully underwent surgery on May 28, 2009. Since then, he has made considerable improvements and is now able to use single words and word approximations to indicate his wants and needs.

[8] In response to this first letter, the Applicant submitted, among other things, a letter from Dr. Gail Andrew, a Developmental Pediatrician and Medical Site Lead in Pediatrics at Glenrose Rehabilitation Hospital. After summarizing the bilateral Cochlear implantation procedure, the surgery Carlos underwent and his subsequent progress, she stated:

> Carlos has already shown that he has benefited from the Cochlear Implantation and it is anticipated that he will continue to benefit. To continue to make progress, he will require ongoing oral rehabilitation and programming which is readily available at the Glenrose Rehabilitation Hospital. There are some other rehabilitation centres in Canada who would be able to provide this level of support. It will be most unlikely that he will receive this type of care if he is to return to Manila. The cost to support Carlos around his disability has already been paid in terms of the expense of the device and surgery. With his at least average non-verbal intelligence, Carlos is in a position to be a functional and contributing member of society. The current literature on early Cochlear Implantation indicates that these children are most likely to be able to attend their education in mainstream placement and have a lower dependence on special education support services. In the province of Alberta, those children served by our Cochlear Implantation Service at the Glenrose Rehabilitation Hospital are demonstrating that outcome. Carlos and other children with Cochlear Implantation cannot be compared to children with similar levels of hearing impairment without the advantage of the Cochlear Implant device. I would like to request that Carlos' application for immigration be reconsidered based on the fact that the most costly part of his treatment has already been provided here in Canada and it will be unlikely that he will receive rehabilitation services that he needs to fully benefit from the device if he is not living in a major centre with access to the services such as those at the Glenrose Rehabilitation Hospital.

[9] In another letter, the principals of an elementary school wrote to say that they would welcome Carlos in their Junior Kindergarten Program, where he would be provided the support of a teacher and special needs assistant to accommodate his learning.

[10] Upon review of the material filed by the Applicant, another medical officer determined that it was likely Carlos will require special education support over the next several years. Based on the Government of Alberta Ministry of Education document entitled Education Funding in Alberta (Kindergarten to Grade 12) 2010/11 School Year, despite his Cochlear implants, he would still qualify for special education funding under code 45 (Deafness-Severe disability). The Medical Officer concluded that Carlos has a health condition that might reasonably be expected to cause an excessive demand on social services. Specifically, that it might reasonably be expected that he will require social service costs for Code 45 funding in Alberta (based on the above-noted Government of Alberta Education document) in the amount of $24,560 per year for 1 year of kindergarten and $16,465 per year for 4 years of elementary school, totalling $90,420 over 5 years.

[11] In view of the new medical assessment, according to which Carlos was medically inadmissible because his health condition might reasonably be expected to cause an excessive demand on social services, the Visa Officer sent another procedural fairness letter to Mr. Perez dated June 9, 2010. This letter advised Mr. Perez that Carlos might be medically inadmissible due to his medical condition and invited him to provide additional information relating to the medical condition or diagnosis, as well as to submit any information addressing the issue of excessive demand.

[12] In response to that second letter, the Applicant submitted further documentation including a new letter by Dr. Gail Andrew. In this letter, Dr. Andrew reiterated the progress made by Carlos and her view that Carlos would be able to attend a regular inclusive classroom setting, with minimal support of a teacher’s assistant and consultation by a speech language pathologist. She also noted

that the Alberta Minister of Education had reviewed information on Carlos and provided a letter of support for Carlos and his family in their application for permanent residence. She concluded:

> I feel that Carlos will not be a burden to the health, education or social services in the province of Alberta. As previously stated, the majority of his health costs have already been incurred and the cost for ongoing Audiology monitoring is minimal. He has excellent general health and except for unforeseen health issues which can occur to anyone across their lifetime, I feel that he will not be a burden. In terms of cost to the educational system, he will be able to participate in a regular classroom setting with quite minimal human support such as a teachers assistant and will benefit from technology devises that all students benefit from. In terms of cost to social services Carlos has a stable and supportive family. His father is gainfully employed in the province of Alberta and is financially stable. (…) If Carlos is to return to the Phillipines, he will be unable to access the level of monitoring of the Cochlear Implant device and appropriate educational services. He will not have access to a centre such as the Glenrose Rehabilitation Hospital where we are very experienced with Cochlear Implantation. As a result of the success of his Cochlear Implant device, Carlos can not be compared to a child with a similar diagnosis of hearing impairment who has not had the advantage of Cochlear Implant device.

[13] Mr. Perez also provided a letter from the Principal of Southview Child Care, a private Early Childhood Services Operator, who took exception with a statement of the Visa Officer that Carlos is expected to cause excessive demand on health and social programs. The letter states, *inter alia*:

> I believe that this statement is incorrect, as Carlos no longer has a health condition. He is now a hearing child and, although he will require auditory monitoring at the Glenrose Rehabilitation Hospital, I strongly believe that Carlos will not require on-going supports as a student and later, as an adult. He has no other medical issues that will prevent him from being able to participate in the regular classroom setting. Our school jurisdiction will access Program Unit Funding for Carlos beginning September 2010 and possibly in the fall of 2011. These funds will enable our school to provide Carlos with support as he is learning how to use his implant and help him to integrate successfully into the classroom setting. It has been my experience in working with children with cochlear implants over the past twenty years that these children are extremely successful and, therefore, Carlos will not be a cause of excessive demand on health,

> education and social services and/or that he will require services costing over the average Canadian.

[14] Finally, Mr. Perez also sent a letter from his employer, stating that he earns $129,000.00 per year and is covered, with his family, by the company's comprehensive benefit plan which includes extensive support for his son's medical condition.

[15] The Applicant's documents and letters submitted in response to the June 2010 procedural fairness letter were forwarded to Immigration Medical Services in Ottawa for consideration by the Medical Officer to assess whether this information altered the previous medical opinion that Carlos' medical condition would cause excessive demand on social services. The Medical Officer noted that despite his Cochlear implant, Carlos still qualifies for special education funding under code 45 (Deafness-Severe Disability). Alberta Education defines a student/child with a severe to profound hearing loss as one that has a hearing loss of 71 decibels or more unaided in the better ear, or has a Cochlear implant preceded by a 71 decibels hearing loss and requires specialized educational supports. Previous reports on file and the new reports submitted confirm that since Carlos' hearing loss occurred prior to his acquisition of normal aural/oral language skills, he will require specialized educational support for the next several years.

[16] Program Unit Funding referred to by the Principal at Southview Child Care, is funding provided to school authorities by Alberta Education for Early Childhood Services, for children with severe disabilities who require additional support beyond what is offered in the regular early childhood education program. Program Unit Funding is provided for individualized programming that meets the education needs of children with severe disabilities or delays, who are less than 6

years of age and may be paid for a maximum of 3 years for each eligible child. Carlos' intended school (Southview) stated that it intended to access this funding for September 2010 and possibly for the fall of 2011.

[17] The Medical Officer determined that even if Carlos only needed specialized educational support in the classroom for the next two years, the Program Unit Funding would amount to $41,025 ($24,560 for kindergarten and $16,465 for Grade 1). This amount is well over the 5 year threshold of $27,525, for that period, for excessive demand. The Applicant did not submit any plan to offset the social services cost of special educational support. Therefore, based upon the results of the medical examinations and all the reports received, including the information presented by the Applicant in response to the June 9, 2010 fairness letter, the Medical Officer concluded that the new information does not modify the previous medical opinion that Carlos is medically inadmissible under paragraph 38(1)(c) of *IRPA* due to a health condition that might reasonably be expected to cause excessive demand on health and social services.

[18] The Visa Officer reviewed the file contents, the medical opinion and all documents submitted in response to the June 2010 procedural fairness letter. The Visa Officer noted that Mr. Perez has not submitted a plan which specifies any private school or private educational support to avoid relying on the Alberta Program Unit Funding, which his preschool facility (Southview Child Care) intended to access in the fall of 2010 and possibly also in the fall of 2011. The Visa Officer determined that the Medical Officer's opinion and assessment of Carlos' medical condition was fair and reasonable and that he was, therefore, inadmissible pursuant to subsection 38(1) of *IRPA*. This,

in turn, rendered Mr. Perez and the rest of his dependants inadmissible pursuant to subsection 42(a) of *IRPA*. Mr. Perez was therefore refused pursuant to subsection 11(1) of *IRPA*.

[19] The Visa Officer then considered possible humanitarian and compassionate ("H&C") grounds as referred to by Mr. Perez in his letter dated August 4, 2010. The letter states that Cochlear implants are rare in the Philippines and that Carlos would lack training and technology for the rehabilitation program there. However, the Visa Officer found that Mr. Perez did not provide any particulars, research or other evidence to support this claim of hardship. Therefore, he was not satisfied that there were sufficient humanitarian or compassionate grounds to justify an exemption from the medical inadmissibility provisions under *IRPA* and the H&C application was refused.

2. Issues

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

a) Did the Visa Officer fail to conduct an individualized assessment of the Applicant's son?

b) Was there a breach of procedural fairness?

c) Was the H&C assessment reasonable?

3. The Statutory Framework

[21] Subsection 38(1)(c) of *IRPA* provides that a foreign national is inadmissible on health grounds if their health condition "might reasonably be expected to cause excessive demand on health or social services". Section 42 of the same Act extends this inadmissibility to other family members:

42. A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if	42. Emportent, sauf pour le résident permanent ou une personne protégée, interdiction de territoire pour inadmissibilité familiale les faits suivants :
(a) their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible; or	a) l'interdiction de territoire frappant tout membre de sa famille qui l'accompagne ou qui, dans les cas réglementaires, ne l'accompagne pas;
(b) they are an accompanying family member of an inadmissible person.	b) accompagner, pour un membre de sa famille, un interdit de territoire.

[22] Pursuant to section 20 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*], an officer shall determine that a foreign national is inadmissible on health grounds if an assessment of their health condition has been made by an officer who is responsible for the application of medical examinations, and the officer concluded that the foreign national's health condition is likely to be a danger to the public health or public safety, or might reasonably be expected to cause excessive demand.

[23] As for "excessive demand", it has been defined in ss. 1(1) of the *IRPR* as follows:

(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	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

which case the period is no more than 10 consecutive years; or	devront probablement être faites après cette période, sur une période d'au plus dix années consécutives;
(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.	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.

[24] The intent of the current medical inadmissibility provision is to avoid negative impact on Canada's publicly funded health and social services systems, by refusing admission to prospective immigrants whose health conditions would create excessive demands on health and social services in Canada, while recognizing at the same time, that certain immigrant groups who have compelling humanitarian and compassionate reasons for entering Canada, not be barred for health reasons. The medical inadmissibility provisions in both the former *Immigration Act* and *IRPA* have as their intent the protection of the finite and costly resources of the Canadian health care system against excessive demands, so as to ensure its sustainability into the future (see *Regulatory Impact Analysis Statement,* Canada Gazette Part II, Extra Vol 136, No 9, p 202).

4. Analysis

[25] There is no dispute between the parties as to the applicable standard of review, at least with respect to the first two questions. As established in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], the first step in conducting a standard of review analysis is to

ascertain whether the jurisprudence has already determined in a satisfactory manner, the degree of deference to be accorded with regard to a particular category of question. Both counsel for the Applicant and counsel for the Respondent agree that the first question involves a factually intensive determination and the specialized nature of a medical officer's opinion and visa officer's assessment, and referred to a number of cases where such issues were held to be reviewable against the standard of reasonableness (see *Hilewitz v Canada (MCI)*, 2005 SCC 57 at para 117, [2005] 2 SCR 706 [*Hilewitz*]; *Canada (Citizenship and Immigration) v Abdul*, 2009 FC 967 at paras 20-22, 353 FTR 307 [*Abdul*]; *Vashishat v Canada (MCI)*, 2008 FC 1346, 77 Imm LR (3d) 230; *Airapetyan v Canada (MCI)*, 2007 FC 42; *Gao v Canada (MEI)* (1993), 61 FTR 65 (FCTD), 38 ACWS (3d) 777).

[26] Review on the reasonableness standard requires the Court to inquire into the qualities that make a decision reasonable, which include both the process and the outcome. Reasonableness is concerned principally with the existence of justification, transparency, and intelligibility in the decision-making process. It is also concerned with whether the decision falls within the range of acceptable outcomes that are defensible in fact and in law (*Dunsmuir*, above, at para 47; *Canada (MCI) v Khosa*, 2009 SCC 12 at para 63, [2009] 1 SCR 389 [*Khosa*]).

[27] I am also of the view that the decision to dismiss the application on H&C grounds attracts a standard of reasonableness. Counsel for the Applicant argued that the Visa Officer failed to give adequate consideration to H&C grounds. This is, however, just another way to say that he disagrees with the Visa Officer's finding, since the H&C arguments were considered but dismissed for lack of supportive evidence. Such an assessment is clearly to be assessed with deference by this Court.

[28] As for the second question, it is well established that a court need not engage in an assessment of the appropriate standard of review. Rather, a reviewing court is required to evaluate whether the rules of procedural fairness or the duty of fairness have been adhered to. The Court does this by assessing the specific circumstances giving rise to the allegation and by determining what procedures and safeguards were required in those circumstances in order to comply with the duty to act fairly. No deference is due (*Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100, [2003] 1 SCR 539; *Dunsmuir*, above, at paras 129 and 151; *Khosa*, at para 43; *Ha v Canada (MCI)*, 2004 FCA 49 at para 44, [2004] 3 FC 195).

> a) Did the Visa Officer fail to conduct an individualized assessment of the Applicant's son?

[29] The Applicant argues that the Medical Officer and the Visa Officer failed to conduct an individualized assessment of the probable excessive demand that Carlos' health condition might place on Canada's social services. To support that proposition, the Applicant relies on the decision of the Supreme Court of Canada in *Hilewitz*, above, where it was held that in considering "excessive demand" the medical officer and the visa officer must necessarily take into account 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. While that decision is based on ss. 19(1)(a)(ii) of the former *Immigration Act*, the Supreme Court made it clear that the same analysis is applicable to ss. 38(1)(c) of *IRPA*, the wording of which is sufficiently similar to the provision it replaced. The following paragraphs of Justice Abella, writing for the majority, capture the essence of that decision:

> 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 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 to pay for the services.
>
> 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 demand on public funds.

[30] I agree with the Applicant that the Medical Officer's assessment, on whose opinion the Visa Officer relied to determine Carlos' admissibility, falls short of the individualized assessment required by *Hilewitz*, above. It appears from the reasons provided by the Medical Officer, that Carlos was not assessed as an individual, taking into account his particular situation, but rather as a member of a class of persons, that is, deaf people. A careful reading of the two letters from Dr. Gail Andrew submitted by the Applicant shows that Carlos should not be treated as a deaf person anymore, and that the surgery that he has undergone was a success. More specifically, Dr. Gail Andrew attests to the following:

> (i) scientific studies show that the auditory potential developed in children with early Cochlear implantation is similar to normal hearing children;
>
> (ii) the educational needs for a child with successful Cochlear implants performed at a young age cannot be compared to the costs of a child with the same level of hearing impairment, who has not had the benefit of this type of technology;
>
> (iii) Carlos has shown 12 months of auditory development within 6 months of the initial stimulation of his device;
>
> (iv) the current literature on early Cochlear implantation indicates that these children are most likely to be able to attend their education in mainstream placement and have a lower dependence on special education support services;
>
> (v) after Cochlear implantation, many individuals are able to pursue post-secondary education with the help of technology supports that are becoming standard in all classrooms, such as Smart Board and laptop computers; and
>
> (vi) Carlos has strong social skills, advanced non-verbal problem solving skills, is well adjusted and has good readiness to learn skills, and will not present with additional classroom challenges.

[31] The Medical Officer, however, focused on Dr. Andrew's statement that "he will be able to attend regular inclusive classroom setting with some supports of a teacher's assistant and consultation by speech language pathologist". He also chose to focus on that part of the report by the principal of the school Carlos would be attending according to which the school would access Program Unit Funding for Carlos beginning September 2010 and possibly the fall of 2011, to enable the school to provide Carlos with support as he is learning to use his implant, and help to integrate

successfully in the classroom setting. On that basis, he concluded that Carlos still qualifies for special education funding for deafness and severe disability in Alberta, which would amount to $41,025 for two years.

[32] I agree with the Applicant that this assessment is not reasonable. It is based on two selective quotes taken out of context. The thrust of the letters written by Dr. Andrew and the Principal of Southview Child Care is that Carlos' hearing and oral abilities have improved substantially since the activation of his Cochlear implant, and that he will need minimal support in terms of teachers' assistants and technological devices. Indeed, the Principal of Southview never said that they will access the Program Unit Funding of the province for the full amount available, or for the next two years. In assuming that the school will seek funding for the maximum amount of $41,025, the Medical Officer did not really consider the submissions made on behalf of Carlos, his actual needs and the probable demands for specialized educational support. In focusing on Carlos' eligibility for these funds, the Medical Officer treated him generically and not as an individual, which is precisely what the Supreme Court warned against in *Hilewitz*.

[33] I also agree with the Applicant that the Medical Officer failed to consider non-medical factors, such as the anticipated need for the social services and the willingness of the family to assist. Indeed, there is no evidence that the Medical Officer paid much attention to the assessment of Dr. Andrew and the Principal of Southview that Carlos will likely need only minimal educational support. It is true that the Applicant did not submit any detailed plan as to how he intended to offset any excessive demand on public funding. Yet he did provide information on his annual salary, and on his comprehensive benefits plan, as well as a signed Declaration of Ability and Intent. Neither

the Medical Officer nor the Visa Officer said anything about the Applicant's ability and willingness to pay for social services in lieu of accessing public funding. To that extent, it cannot be said that the decision was based on all relevant available information and that it was reasonable.

b) Was there a breach of procedural fairness?

[34] It is settled law that the duty of fairness requires that an applicant be given notice of the particular concerns of the immigration officer and be granted a reasonable and meaningful opportunity to respond by way of producing evidence to refute those concerns (*Rukmangathan v Canada (MCI)*, 2004 FC 284 at para 22, 247 FTR 147; *Sapru v Canada (MCI)*, 2011 FCA 35 at paras 31-32, 330 DLR (4th) 670 [*Sapru*]).

[35] The ability to meaningfully participate in the decision-making process requires clear notice of the case to be met, a full and fair opportunity to present evidence and submissions relevant to that case, and full and fair consideration of the case: *Hersi v Canada (M.C.I.)* (2000), 198 F.T.R. 120, at para 20 (FCA).

[36] In light of the principles espoused in *Hilewitz* and in other cases, Citizenship and Immigration Canada published an Operational Bulletin on "Accessing Excessive Demand on Social Services" on September 24, 2008 (Operational Bulletin 063). This Bulletin was complemented on July 29, 2009 by Operational Bulletin 063B, which does not significantly alter the procedures that immigration officers are to follow when assessing probable excessive demand on social services. While these guidelines are not legally binding, they are nonetheless valuable tools in assessing the immigration officer's duties; they reflect the respondent's own view as to what may be necessary to

achieve a fair outcome and they can certainly create expectations that they will be adhered to (*Frank v Canada (MCI)*, 2010 FC 270 at para 21, [2010] FCJ No 304 (QL); *Firouz-Abadi v Canada (MCI)*, 2011 FC 835 at para 21, [2011] FCJ No 1036 (QL) [*Firouz-Abadi*]).

[37] This policy is meant to clarify the roles of the medical officer, the immigration or visa officer and the applicant in those cases where the medical officer has indicated that the applicant or dependent family member has a health condition which might reasonably be expected to cause an excessive demand on social services in Canada. It requires immigration officers to send fairness letters to invite them to provide additional information required to overcome findings of inadmissibility, as well as the pertinent sections of the *IRPR* and a "Declaration of Ability and Intent" to be signed by the applicant. This Declaration is intended to inform applicants that their application for permanent residency may be refused, unless they can provide a detailed plan to an immigration officer, ensuring that their dependant will not impose an excessive demand on Canadian social services.

[38] In the case at bar, the procedure followed by the Visa Officer was clearly deficient. The Applicant received two procedural fairness letters in response to his application for permanent residency. In both of these letters, the Visa Officer essentially adopted and reproduced the Medical Officer's assessment, without ever telling the Applicant that he was expecting a detailed plan to offset the probable excessive demand on Canadian social services.

[39] The Applicant could reasonably understand from the first letter that the Visa Officer's main concern (based on the Medical Officer's assessment) was that Carlos would have to attend a special

school for the deaf, which would cost $35,000 (for a non-residential student) to $70,000 (for a student in residence) per year. The Applicant addressed this concern by submitting documentation to demonstrate that Carlos was a hearing, healthy child, and that it was not necessary for him to attend a special school for the deaf.

[40] In response to the second letter, according to which the cost implications for Carlos' special education needs (based on available funding in Alberta for deaf children) would amount to $90,420 for the next five years, the Applicant once again submitted further documentation to demonstrate that Carlos is not deaf anymore, and that he will only need minimal assistance in the classroom for which the Applicant was willing and able to pay.

[41] Despite the Applicant's detailed submissions, his application was eventually rejected because the Visa Officer was significantly concerned about the Applicant's lack of a detailed plan to offset the probable excessive demand on Canadian social services:

> File reviewed, including all documents received in response to my procedural fairness letter of June 2010. I note that the applicant has not submitted a plan which specifies any private school or private educational support in order to avoid relying on Alberta public program unit funding (PUF) – which his preschool facility (Southview Child Care) intended to access in fall 2010 and possibly also in fall 2011. In the absence of specific information on how they propose to use private social services in place of the publicly-available ones already mentioned, I am not satisfied that this represents a credible plan to offset the assessment of probable excessive demand on social services.
>
> Applicant's Record, Tab 3, at p. 12 (CAIPS notes).

[42] The Visa Officer failed to notify the Applicant about his concern. No reference to the requirement of a specific plan was ever communicated to the Applicant in either the first or the

second fairness letter. The form letter proposed by the Operational Bulletin states, in part, as follows:

> Before I make a final decision, you have the opportunity to submit additional information that addresses any or all of the following:
>
> • the medical condition(s) identified;
> • social services required in Canada for the period indicated above; and
> • your individualized 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.
>
> (…)
>
> In order to demonstrate that you/your family member will not place an excessive demand on social services, if permitted to immigrate to Canada, you 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 immigrating to Canada. The sections of the Immigration and Refugee Protection Regulations that define the meanings of "social services" and "excessive demand" are included for your reference.

[43] The two fairness letters sent to the Applicant contained none of that language or anything equivalent. The only reference to further information that may be provided by the Applicant is quite cryptic and merely mentions the following:

> Before I make a final decision, you may submit additional information relating to this medical condition or diagnosis. You may also submit any information addressing the issue of excessive demand if it applies to your case.

[44] This was far from being explicit enough to apprise the Applicant of the Visa Officer's concern that the Applicant had not submitted a detailed plan. Counsel for the Respondent argued that it would be elevating form over substance to require that the wording of the fairness letter be exactly the same as that found in the form letter appended to the Operations Manual. I cannot agree

more with that proposition, as long as the language chosen by the Visa Officer appropriately conveys his concern to an applicant. Here, the Applicant was left in the dark as to what precisely was required of him, in terms of addressing the Visa Officer's preoccupations on the issue of excessive demand. The problem is compounded by the fact that the Visa Officer did not send a Declaration of Ability and Intent to the Applicant to be signed and returned. Had the Applicant received such a Declaration, his attention would have been drawn to the need to present a detailed plan in order to avoid any excessive demand on Canadian social services.

[45] This case is indistinguishable from the decision of my colleague Justice Barnes in *Firouz-Abadi*, above, where he found that the Applicant was not properly notified of the Visa Officer's concern in similar circumstances. A similar notification was also found to be lacking by Justice Kelen in *Abdul*, above, at para 26. Counsel for the Respondent tried to argue that these cases are inconsistent with the decision of the Court of Appeal in *Sapru*, above, where it was held that a medical officer is not obligated to seek out information about an applicant's ability and intent to mitigate excessive demands on social services from the outset of the inquiry, provided that the fairness letter gives an applicant a fair opportunity to respond to any concerns. However, the Court added an important *caveat*: the fairness letter must clearly set out all of the relevant concerns and provide a true opportunity to meaningfully respond to all of the concerns of the medical officer. Indeed, the fairness letter sent by the visa officer in that case closely followed the form letter stipulated in the respondent's Operational Bulletin.

[46] For all of the foregoing reasons, I am therefore of the view that the fairness letters fell short of the requirements set forth in *Sapru*, above, and did not adequately spell out the information

sought by the Visa Officer. As a result, it cannot be said that the Applicant was provided with full and clear notice of the case to be met, nor did he receive a full and fair opportunity to present relevant evidence that would have enabled the Visa Officer to make an individualized assessment of his case. This clearly amounts to a breach of the Applicant's right to procedural fairness.

c) Was the H&C assessment reasonable?

[47] As I have found that the decision of the Visa Officer must be quashed both because it is unreasonable and because it is in breach of procedural fairness, I need not answer this third question. I shall nevertheless comment briefly on the Applicant's submission in this respect, if only to provide guidance with respect to any further assessment of his application.

[48] Mr. Perez argues that the Visa Officer failed to give adequate consideration to H&C grounds and did not give sufficient weight to the comments made by Carlos' pediatrician and the Southview Day Care Principal that Carlos will not have access to the same service and technology in the Philippines.

[49] I find this submission without merit. First of all, the Visa Officer specifically considered the H&C grounds submitted by Mr. Perez and noted, specifically, the Applicant's claim that Cochlear implants are rare in Philippines and that Carlos would not have access to the technology, rehabilitation and training enabling Carlos to benefit fully from his surgery. He nevertheless dismissed this claim of hardship, on the basis that the Applicant did not provide any specific information or research to support it.

[50] The person making an H&C application bears the onus of satisfying the immigration officer that, in his or her personal circumstances, an exemption to *IRPA* requirements is justified on H&C grounds. To that extent, bald assertions suggesting that medical and social services are not available in the Philippines were not sufficient to meet that onus. The fact that he relies for these bald assertions on information from his Canadian pediatrician and day-care director does not bolster his case. Neither of these two professionals provided any information as to the source of their belief that programs, rehabilitation and training for Cochlear implants are not available in the Philippines.

[51] Mr. Perez has provided no information from any reliable or knowledgeable source as to what programs, facilities and training is available in the Philippines. He has provided no evidence to suggest that he has made any inquiries in the Philippines as to what programs, facilities and training is available in the Philippines. In truth, he did provide some evidence to that effect as part of the affidavit that he filed in support for this application for judicial review. However, that evidence was not before the Visa Officer and the Medical Officer, and it cannot be considered by the Court. It is trite law that in a judicial review application, the only material that should be considered is the material that was before the decision-maker (*McConnell v Canadian Human Rights Commission*, 2004 FC 817 at para 68, 132 ACWS (3d) 106, aff'd at 2005 FCA 389, 143 ACWS (3d) 1066; *Lalane v Canada (MCI)*, 2009 FC 5 at paras 14-20, 338 FTR 238).

[52] Mr. Perez has failed to fulfil his onus and assume his burden of proof. Consequently, the Visa Officer could reasonably dismiss his H&C application.

5. Conclusion

[53] For these reasons, the application for judicial review will be granted. Counsel posed no question for certification, and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is granted. No question is certified.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-925-11
STYLE OF CAUSE:	RONILO VELASQUEZ PEREZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	September 6 2011
REASONS FOR JUDGMENT AND JUDGMENT:	de MONTIGNY J.
DATED:	November 22, 2011

APPEARANCES:

Phebe Chan	FOR THE APPLICANT
Helen Park	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Fraser Milner Casgrain LLP Vancouver, BC	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Vancouver, BC	FOR THE RESPONDENT