Federal Court  Cour fédérale

Date: 20111213

Docket: IMM-4752-10

Citation: 2011 FC 1383

Ottawa, Ontario, December 13, 2011

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

RABIUL MOHAMMED ASHRAF
MOHAMMED ALI ASHRAF
RAHIMA ASHRAF
IREEN AKTER

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

[1] This application was initially brought by the Applicants for an order of mandamus compelling the Respondent to render a decision with respect to the Applicants' sponsored application for permanent residence as a member of the family class. The Applicants also sought an order prohibiting the Respondent from pursuing allegations of medical inadmissibility or fraudulent misrepresentation relating to the medical condition of the Applicant, Mrs. Rahima Ashraf. Finally,

the Applicants also sought a direction from the Court that the Respondent issue permanent residence without requiring further documents apart from valid passports.

[2] The Applicants' application for permanent residence has not followed the usual course for such applications. It involves an initial denial of permanent residence due to medical inadmissibility, a successful appeal to the Immigration Appeal Division of the Immigration and Refugee Board (IAD), a further request for medical information contrary to the usual practice of not revisiting medical reports following a successful IAD appeal on medical inadmissibility, another finding of medical inadmissibility on receipt of new medical reports, an allegation of fraudulent medical misrepresentation, and a third request for medical information which was not complied with culminating in a decision denying the application for permanent residence because the Visa Officer was not satisfied the Applicants met the requirements for immigration. All this occurred over a period of eight years.

[3] I find judicial review was warranted but I decline to grant the requested remedies of mandamus and prohibition for the reasons that follow.

Background

[4] Mr. Rabiul Mohammed Ashraf is a Canadian citizen who sponsored his parents, Mr. Mohammed Ali Ashraf and Mrs. Rahima Ashraf, and his younger sister, Ms. Ireen Akter, for permanent resident status as members of the family class. All three Applicants are citizens of Bangladesh.

[5] Mr. Rabiul Ashraf applied to sponsor his parents and sister in July 2002. His sponsorship was given initial approval and the Applicants (Ali Ashraf, Rahima Ashraf and Ireen Akter) submitted their permanent residence applications on April 25, 2003 to the High Commission of Canada in Singapore.

[6] On December 18, 2006, the Visa Officer refused the applications for permanent residence because the mother, Mrs. Rahima Ashraf, was medically inadmissible. The Visa Officer found Mrs. Ashraf was inadmissible on health grounds because of chronic renal failure. She previously had had a kidney transplant and the Visa Officer concluded that her health condition might reasonably be expected to cause excessive demands on health or social services as set out in paragraph 38(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*).

[7] Mr. Rabiul Ashraf, the sponsor, appealed the Visa Officer's decision to the IAD. On May 19, 2009, the IAD allowed the appeal.

[8] The IAD found that neither the medical officer nor the Visa Officer had conducted an individualized assessment of Mrs. Ashraf's medical costs other than considering the costs for two immunosuppressive drugs. The cost of those drugs did not constitute excessive demand. The IAD concluded that the Visa Officer's decision was not valid in law.

[9] The IAD addressed the question of humanitarian and compassionate (H&C) grounds. The IAD considered the fact that the Appellant had demonstrated that he has continually supported his parents and was willing to continue to do so once they arrived in Canada as weighing in the

Appellant's favour. The IAD found that the parents owned property in Bangladesh and had funds of approximately $90,000 to use as required. The IAD member was satisfied they would not become a burden on the Canadian public.

[10] The IAD also considered the Appellant's concern to have his parents in Canada so that his children and his brother's child would grow up knowing their grandparents. The IAD concluded there were sufficient H&C grounds to warrant special consideration, taking into account the best interests of the children affected by the decision.

[11] In result, the IAD concluded that the Visa Officer's refusal to grant permanent resident status on grounds of medical inadmissibility was wrong in law. The IAD also allowed the appeal on H&C grounds, taking into consideration the additional cost for the immunosuppressive drugs, the resources of the family, and the best interests of the children directly affected the decision.

[12] The IAD directed:

> The appeal is allowed. The officer's decision to refuse a permanent resident visa is set aside, and the officer must continue to process the application in accordance with the reasons of the Immigration Appeal Division.

[13] The Visa Officer employed at the High Commission of Canada in Singapore continued processing the Applicants' application for permanent residence as members of the family class. On June 25, 2009, the Visa Officer entered the following notation in the CAIPS notes: "Spouse's medical inadmissibility has been set aside by IAD. …". The Visa Officer provided an affidavit

concerning the events that occurred with respect to the processing of this application for permanent residence. He declared:

> In cases of medical admissibility where appeals to the IAD are allowed, the policy at the High Commission in Singapore is that when medicals are obtained, they are stamped "appeal allowed" so that the medical section does not request a furtherance. However in this particular case, the medicals were not stamped in error.

[14] On November 25, 2009, the visa section in Singapore requested medicals for all family members.

[15] On January 25, 2010, the designated medical practitioner (DMP), Dr. Wahab, concluded medical examinations of the Applicants. Dr Wahab reported Mrs. Ashraf's creatinine level to be 2.1 mg/dl. He noted that she provided him with a report dated January 19, 2010 from her doctor, Dr. Khan, which showed her creatinine level at1.2 mg/dl. Creatinine is a waste product generated in the body and the creatinine level is an indicator of kidney function.

[16] On February 4, 2010, the Regional Medical Officer sent a request (via the Visa Officer) to Dr. Khan to explain the difference between the results of the creatinine levels he reported on January 19, 2010 and those reported by Dr. Wahab on January 25, 2010.

[17] On February 9, 2010, the visa section sent a letter requesting further medical tests in accordance with the medical officer's request to the DMP for a recent report from Dr. Khan to include details of current clinical status or any relevant investigation performed as well as clarification of the differing creatinine levels.

[18] On February 18, 2010, the Applicants' counsel advised that Mrs. Ashraf would attend a further medical examination but reminded the Visa Officer of the IAD decision and requested the processing not be delayed due to considerations related to Mrs. Ashraf's medical condition.

[19] On February 23, 2010, the Visa Officer provided a copy of the IAD decision to the medical section. In the CAIPS notes is the following notation:

> Copy of IAD decision regarding medical condition provided to medical section today to overt [sic] another furtherance for the condition identified in the appeal.

That same day the Visa Officer advised counsel for the Applicants by email that the next medical determination will not be delayed due to the specific condition identified in the ruling.

[20] On March 2, 2010, the Visa Officer was advised that Mrs. Ashraf may have received a request for medical follow-up from the medical section and this notice should be ignored.

[21] Also on March 2, 2010, the medical section sent a report to the Visa Officer finding Mrs. Ashraf to be medically inadmissible because of renal (relating to the kidneys) failure. The medical report concluded that Mrs. Ashraf was in stage 4 of chronic renal failure. The prognosis of renal failure is that it was reasonable to expect progressive deterioration of the Applicant's kidney function "as has been already seen" and she would require ongoing assessment and management by specialists in the field of renal disease as well as diabetes and hypertension. The report stated "Further deterioration of her already impaired renal function will require access to specialized hospital facilities and services for diagnosis and treatment including pre-dialysis and renal transplantation."

[22] The medical officer offered the opinion that Mrs. Ashraf had a health condition that might reasonably be expected to cause excessive demand on health services the costs of which will exceed the Canadian per capita costs over five to ten years and opined that Applicant was therefore inadmissible under Section 38(1)(c) of the *IRPA*.

[23] On March 4, 2010, the medical section sent an email to the Visa Officer reiterating concerns over the large discrepancy between Dr. Wahab's (2.1 mg/dl) and Dr. Khan's (1.2 mg/dl) creatinine findings. The email states:

> Paul as discussed re Appeal Allowed case Ashraf find two medical reports written by the same doctor almost three years apart. I note that the content of the Jan 2010 letter is much less, but what IS there is almost identical to that written in March 07. Of interest to Dr. Dobie and the reason for the furtherance before we learned that this was an Appeal Allowed file was the doctor's reference to a serum creatinine of 1.2 when in fact the recent report we had in hand showed it o (sic) be 2.1.
>
> I might have considered that a simple reversal of numbers in the report except that 1) the report is almost identical to the previous one and 2) a Nephrologist would NEVER say a graft function is normal if he actually saw the 2.1 result.

[24] On April 12, 2010, the Visa Officer then requested a site visit to Dr. Khan's office in Dhaka. He attached the medical report dated March 2, 2010 which was at variance with Dr. Khan's January 19, 2010 report and asking the site visitor to ask for an explanation of this "gross error".

[25] On April 30, 2010, the Visa Officer informed Applicants' counsel they were investigating possible fraud on the file. On May 3, 2010, the Visa Officer further advised Applicants' counsel that they were looking into the medical report provided by Dr. Khan with regard to Mrs. Ashraf's renal transplant. Counsel for the Applicants responded on May 5, 2010 and submitted that the H&C

ruling made medical inadmissibility no longer an issue and also contended the IAD was cognizant of Mrs. Ashraf's medical problems. Counsel also denied any fraud.

[26] On May 26, 2010, a representative from the Immigration Section at the Canadian High Commission in Dhaka visited Dr. Khan. The site visitor reported Dr. Khan stated the serum creatinine level was 1.20 mg/dl not gm/dl (correcting a typographical error in the January 19, 2010 report) and advised that the last visit by Mrs. Ashraf was on May 18, 2010. He provided a printout of the report of that visit. The May 18, 2010 printout indicated Mrs. Ashraf presented with: "Raised Creatinine. Cough. Renal check up." The report also had a handwritten notation "now up to 1.4 luc…". Dr. Khan pointed out the patient was suffering from an infection which is why the creatinine level was higher, registering at1.4 mg/dl that day she visited. The site visitors also reported Dr. Khan said the patient may need dialysis within five years.

[27] On June 1, 2010, the Visa Officer followed up on the site visit report he received. He emailed Dr. Khan asking about the difference between Dr. Khan's report of 1.2 mg/dl creatinine level and the report from the Designated Medical Practitioner that her level was 2.1 mg/dl. He also questioned the doctor's reported statement that Mrs. Ashraf will need dialysis within five years.

[28] Dr. Khan responded by email on June 2, 2010 advising that he told the site visitors that it is unlikely Mrs. Ashraf will require dialysis within five years unless she is very unlucky. Her renal function is stable since transplantation. Dr. Khan stated "however she had some fluctuation of renal function particularly during the infection as renal transplants are prone to recurrent infection. Serum creatinine level 1.2 mg/dl and 2.1 mg/dl is not a big difference for her."

[29] On June 10, 2010, the medical section requested from the DMP a recent report from Dr. Khan and serum testing of Mrs. Ashraf.

[30] On June 16, 2010, counsel for the Applicants again denied the medical report was fraudulent and challenged the relevance of medical reports because the appeal was allowed on H&C grounds despite the medical inadmissibility issue.

[31] On June 25, 2010, the Visa Officer emailed the Applicants' counsel advising that he would be away until the beginning of August. He sought to assure counsel the concerns were genuine and included his notes on CAIPS so counsel could see their reasoning. The notes read:

> Discussed file with Ops Mgr.
> Large discrepancy in creatinine levels in tests done by DMP (2.1) and subjects neprologist (1.2). The DMP's results suggest that the patience [sic] is very much worse than what her doctor had indicated. Tests were done less than one week apart. Site visit was conducted by Dhaka to talk with doctor. He said that patience [sic] was just in a week earlier (May18) and her level was 1.4 but that this was due to an infection. He also said that she may need dialysis within 5 years. Spoke to MOF who said that if her level is 1.2 which is normal, why does he think she will need dialysis in 5 years. I asked the doctor why he thought that and why the discrepancy between his test and DMPs. First he stated that " it is very unlikely to require dialysis within 5 years unless she is very unlucky." He described the discrepancy as "not a very big difference for her". MOF states this is a very big difference and means that her kidneys are failing again.
>
> Appeal was allowed based on the fact that the excessive demand was not that much. Also, H&C was granted but panellist stated "In considering humanitarian and compassionate grounds, I have taken into account the amount of the excessive demand. That amount as demonstrated by the appellant's counsel is $620 over the 5-year period. This amount in my view is minimal and on a scale, I am of the view that less humanitarian and compassionate grounds are needed in order to get over the inadmissibility than if the amount of excessive demand is greater" Dr. Khan's tests etc. were used as a guide in the decision. I [sic] appears that his testing has now been called into question. Given that the panellists decision was based on his treatment/testing and that the H&C was granted in part due to his framing of the case as not that much above the EDSS threshold, Ops Mgr and VO are of the opinion that there is scope to continue with the medical

> furtherance that was abandoned earlier. Med Section is now proceeding with furtherance letter to subject via rep.

The Visa Officer concluded by saying he hoped this shed light on the reasoning and why Mrs. Ashraf was required to completed the medical furtherance.

[32] On July 24, 2010, Dr. Khan provided a "To Whom It May Concern" report on the site visit. He stated he first corrected a printing error in the 2007 report in that Mrs. Ashraf's creatinine level was 1.2 mg/dl not 1.2 g/dl. Second he explained the difference of the January 19, 2010 report (creatinine was 1.20 mg/dl) and January 26, 2010 (creatinine was 2.1 mg/dl) was because of a chest infection and that it was quite possible for a transplant patient to have fluctuations in creatinine level due to infection. He added her renal function was stable since the transplant in February 2006. He stated she has had similar fluctuations several times in the past. He had reported that she had 1.4 ml/dl in May 2010. He told the site visitors he did not see any major problem with her kidney condition and it was unlikely she would require dialysis within five years.

[33] Dr. Khan concluded by stating Mrs. Ashraf visited him that day, July 24, 2010, and he assessed her renal function using two different laboratory centres. He found her serum creatinine level to test at 1.36 mg/dl (Apollo Hospitals) and 1.4 gm/dl (Square Hospitals Ltd.). Copies of the laboratory results were appended.

[34] On November 8, 2010, another request was made to complete the Applicant's further medical examination. Mrs. Ashraf did not complete a further medical examination.

[35] On January 24, 2011, the Visa Officer refused the application for permanent residence because the Applicants had not complied with the requirements of subsections 16(1) and 16(2)(b) of the *IRPA* which reads:

> 16(1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.
>
> 16(2)(b) the foreign national must submit to a medical examination on request.

P*rocedural History*

[36] The Applicants filed this application for leave and judicial review under section 72(1) of IRPA on August 16, 2010.

[37] Two days later, on August 18, 2010, the Applicants brought a motion for injunction preventing the Respondent from refusing the application on medical or misrepresentation grounds until the application for mandamus is determined. That motion for injunction was dismissed on September 3, 2010.

[38] On January 13, 2011, the Applicants' application for leave and judicial review, namely for mandamus, prohibition and direction, was granted by Justice Kelen.

[39] On February 14, 2011, the Applicants filed a sponsorship appeal with the IAD relating to the Visa Officer's January 24, 2011 refusal of the sponsorship application for permanent residence under the family class.

[40] The Respondent subsequently brought a motion to have the mandamus application dismissed as moot. This motion was dismissed by the Court.

Decision Under Review

[41] The Applicants were seeking to have a decision made on their application for permanent residence under the family class status. At the time they filed their application, the issue had arisen as to whether the Visa Officer could require a medical furtherance of Mrs. Ashraf's condition having regard to the IAD appeal decision of the IAD. Notwithstanding the Applicants' objections, the Visa Officer required a medical furtherance of Mrs. Ashraf which was not provided.

[42] Ordinarily there would be no issue arising where a requested decision was made before the mandamus application could be heard. However, in this instance, the Visa Officer's decision is made on contentious grounds, namely the question of the validity of the medical furtherance request having regard to the IAD decision.

[43] Section 72(1) states judicial review under *IRPA* is broadly available. An applicant may apply for judicial review "with respect to any matter – a decision, determination or order made, a measure taken or a question raised" but the application may not be made until any right of appeal that may be provided by this Act is exhausted.

[44] Notwithstanding that a decision has been made and the Applicants have appealed to the IAD, it seems to me that controversies remain between the Applicants and Respondent that this Court should address.

Legislation

[45] The *Immigration and Refugee Protection Act* provides Section 38(1)(c), Section 42(a), Section 67(1) and (2), Section 70(1).

16(1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.	16. (1) L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.
16(2)(b) the foreign national must submit to a medical examination on request.	(2) S'agissant de l'étranger, les éléments de preuve pertinents visent notamment la photographie et la dactyloscopie et il est tenu de se soumettre, sur demande, à une visite médicale.
…	…
38. (1) A foreign national is inadmissible on health grounds if their health condition …	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
(c) might reasonably be expected to cause excessive demand on health or social services.	

	santé.
…	…
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;
…	…
67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
(a) the decision appealed is wrong in law or fact or mixed law and fact;	a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;
(b) a principle of natural justice has not been observed; or	b) il y a eu manquement à un principe de justice naturelle;
(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.
Effect	Effet
(2) If the Immigration Appeal Division allows the appeal, it	(2) La décision attaquée est cassée; y est substituée celle,

shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.	accompagnée, le cas échéant, d'une mesure de renvoi, qui aurait dû être rendue, ou l'affaire est renvoyée devant l'instance compétente.
…	…
70. (1) An officer, in examining a permanent resident or a foreign national, is bound by the decision of the Immigration Appeal Division to allow an appeal in respect of the foreign national.	70. (1) L'agent est lié, lors du contrôle visant le résident permanent ou l'étranger, par la décision faisant droit à l'appel.
…	…
72. (1) Judicial review by the Federal Court with respect to any matter – a decision, determination or order made, a measure taken or a question raised – under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
(2) the following provisions govern an application under subsection (1): (a) the application may not be made until any right of appeal that may be provided by this Act is exhausted;	(2) Les dispositions suivantes s'appliquent à la demande d'autorisation : a) elle ne peut être présentée tant que les voies d'appel ne sont pas épuisées;

[46] The Applicants characterize the issues as follows:

1. Does the Visa Officer have jurisdiction to reconsider the medical inadmissibility issue given the decision of the Immigration Appeal

Division which decided there was no inadmissibility, and in any case, allowed the appeal on H&C grounds?

a. Are the Visa Officer's concerns about the Applicant's creatinine levels unreasonable?

[47] The Respondent differs and has characterized the issue in part as:

1. The Respondent has not acted unlawfully and has not unreasonably delayed the processing of the Applicants' application for permanent residence.

[48] I would characterize the issues as follows:

1. To what extent is a Visa Officer bound by the decision of the IAD?

2. Is the Visa Officer entitled to investigate fraudulent misrepresentation with respect to medical information arising after the IAD decision?

3. Is it permissible for the Visa Officer to request a medical furtherance on the basis of new information which has subsequently become available?

Standard of Review

[49] The Supreme Court of Canada has held that there are only two standards of review: correctness for questions of law and reasonableness involving questions of mixed fact and law and fact: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at paras 50 and 53. A review in court may consider and apply past jurisprudence which has already established standard of review in a particular case: *Dunsmuir* at para 62.

[50] The decision of a visa officer where it concerns the obligation to conform to the decision of the IAD would be a matter of correctness since it relates to the interpretation of Section 70(1) of

IRPA. The decision of the visa officer on a question of medical inadmissibility is a question of fact or mixed law and fact which involves a standard of reasonableness: *Firouz-Abadi v Canada (Minister of Citizenship & Immigration)*, 2011 FC 835 at para 10.

Analysis

[51] The Applicants submit that the Visa Officer did not have jurisdiction to decide as he did in refusing the Application because of the binding effect of the IAD decision by operation of section 70 of the *IRPA*. Section 70 provides that an officer, in examining a permanent resident or a foreign national, is bound by the decision of the Immigration Appeal Division.

[52] The Applicants submit Parliament's intention in enacting section 70(1) of the *IRPA* was to achieve finality after an appeal, and that the Visa Officer was strictly bound by the decision of the IAD to allow the appeal and that the Visa Officer could not revisit the appeal decision.

[53] The Respondent emphasizes that it is open to the Visa Officer to consider new material facts that were not before the IAD when it rendered its decision on appeal. The IAD decision does not prohibit a refusal based on new and relevant information, even if the statutory basis of the refusal remains the same.

[54] The Respondent cites *Au v Canada (Minister of Citizenship and Immigration*), 2002 FCA 8, where the appellant was first refused permanent residence in 1995 by a visa officer on the grounds that he was inadmissible to Canada due to his criminal convictions. The IAD found that while the refusal was valid, special relief was warranted based on H&C grounds, including the fact that the

criminal convictions were quite old. When the matter was sent back to a second visa officer, this visa officer discovered new information of criminal convictions in the previous years that had not been disclosed to the IAD. The second visa officer therefore denied the appellant's application on the basis of criminal inadmissibility. The appellant sought judicial review on the basis that the second visa officer was precluded from refusing admission on a requirement that the IAD had already dealt with. The Federal Court of Appeal considered section 77 of the *Immigration Act* (the predecessor of section 70 of *IRPA*), and found that it was open to a visa officer to consider new material facts not before the IAD in deciding whether to approve an application. The Federal Court of Appeal held:

> 15 Under subs. 77(5), the visa officer must determine whether the sponsor and the individual being sponsored meet the requirements of the Act. That is both a legal and factual inquiry. When the IAD has found that an individual does not meet the requirements of the Act on the facts before it, but nevertheless grants humanitarian and compassionate relief, a visa officer under subs. 77(5) cannot deny the individual that relief on the basis of those same facts. The words "those requirements" that describe the requirements that the visa officer is prohibited from considering must have the same meaning as the immediately preceding words "meet the requirements of this Act and the regulations". The visa officer cannot consider the same facts that have been considered by the IAD and come to a different decision than the IAD. As the appellant points out, the visa officer does not, under subs. 77(5), sit in appeal or review of a decision of the IAD. That is the reason for the words "other than those requirements on which the decision of the Appeal Division has been given".
>
> 16 However, the relief granted by the IAD is predicated on the facts presented to the IAD. Where new facts come to the attention of the visa officer, the visa officer is required to consider whether the sponsor and the person being sponsored meet the requirements of the Act, having regard to those new facts. Of course, the facts must be new in the sense that they arose after the IAD hearing or, as in this case, were within the knowledge of the sponsoree but were withheld from the IAD and were discovered subsequently. Also, the new facts considered by the visa officer must be material. A visa officer cannot seize on insignificant facts. To do that would, in effect, mean that the

> visa officer was considering whether the individual met the requirements of the Act on virtually the same material facts considered by the IAD.
>
> [Emphasis added]

[55] The Respondent also cites the recent *Ayertey v Canada (Minister of Citizenship and Immigration*), 2010 FC 599, where the Applicant's application to sponsor her 22-year-old son who was a student was denied on the basis that the Applicant was in receipt of social assistance. The IAD allowed the appeal on H&C grounds and returned the matter to the visa officer with the same instructions to "continue to process the application in accordance with the reasons of the IAD". During the interview with a second visa officer, the son admitted that he was not a full time student. As a result, the sponsorship application was rejected as the visa officer was not satisfied the son met the definition of a dependent child.

[56] The issue before the Federal Court in *Ayertey* was whether the second visa officer was bound to accept that the son was in full-time studies. The Federal Court noted that the IAD did not exercise its discretion to substitute its own determination, but rather returned the matter to the visa officer with the s.70 instructions. The Court noted, "Had the IAD meant, in its 2006 decision, that the only matter for consideration in the subsequent visa officer review was 'special relief', the IAD would have substituted a determination that, in its opinion, should have been made - as allowed for in s. 67(2) of *IRPA*.": *Ayertey* at para 12. The Court concluded that the first IAD decision did not mandate that the second visa officer accept the earlier findings of the first officer.

[57] I agree with the Respondent. Like *Ayertey*, the IAD concluded its decision in Mrs. Ashraf's case with the words "… the officer must continue to process the application in accordance with the

reasons of the Immigration Appeal Decision." I conclude the IAD decision did not require the Visa Officer to limit the factual findings to that which was before the IAD in the first instance.

Fraud Allegation

[58] The Applicants further submit the Visa Officer's decision was unreasonable. The Applicants say the Visa Officer stated they were inquiring into a possible fraud allegation. They did not find any evidence to that effect.

[59] The fraud allegation arises following the discrepancy in the two reports of Mrs. Ashraf's creatinine levels in January 2010 by Dr. Khan and Dr. Wahab. Their genesis appears to be the email from the medical section on March 4, 2010 where the writer vigorously disputes Dr. Khan's reports. To repeat, that email states:

> Paul as discussed re Appeal Allowed case Ashraf find two medical reports written by the same doctor almost three years apart. I note that the content of the Jan 2010 letter is much less, but what IS there is almost identical to that written in March 07. Of interest to Dr. Dobie and the reason for the furtherance before we learned that this was an Appeal Allowed file was the doctor's reference to a serum creatinine of 1.2 when in fact the recent report we had in hand showed it o (sic) be 2.1.
>
> I might have considered that a simple reversal of numbers in the report except that 1) the report is almost identical to the previous one and 2) a Nephrologist would NEVER say a graft function is normal if he actually saw the 2.1 result.

[60] I begin by saying that this is not a medical report. Nor is it well grounded. The two reports of Dr. Khan from 2007 and 2010 are similar, not surprising given the forms used, but not "almost

identical". The email makes reference to the IAD appeal which is not part of any medical assessment. Finally, it speculatively and loudly opines "a Nephrologist would NEVER say a graft function is normal if he actually saw the 2.1 result."

[61] As a result of the email, the Visa Officer ordered a site visit, advised the Applicants' counsel they were investigating a possible fraud, and required a medical furtherance of Mrs. Ashraf. However, at the hearing of this matter, the Respondent disclaimed any reliance on a medical fraud claim. Nor was there any further inquiry following the receipt of Dr. Khan's emailed response to the site visit on June 2, 2010. However, the Visa Officer indirectly uses the allegation to question the reliability of Dr. Khan's testing before the IAD.

[62] In my view, the fraud allegation unnecessarily complicated the processing of the Applicants' application for permanent residence and distracted the parties from addressing the matter at hand, namely the March 2, 2010 Medical Officer's report which interpreted the 2.1 mg/dl creatinine test result as being an indication that Mrs. Ashraf's kidneys were failing and concluding she was medically inadmissible. Despite a careful review of the certified tribunal record, there is no indication this finding was put to the Applicants by way of a fairness letter.

[63] As a result, the question of whether the different creatinine readings represented a new adverse turn in the state of Mrs. Ashraf's health or were merely a fluctuation due to a transitory factor such as a respiratory illness was never addressed.

New Information

[64] I have found the Visa Officer is not limited to the factual findings that were before the IAD. In considering whether the Visa Officer is entitled to have regard to the 2.1 mg/dl creatinine level reported in the January DMP testing I note first the request for medical reports was the result of an error by visa officials in failing to note the IAD decision on file. I also note that the Applicants though their counsel consented to the medical examination to be done with the IAD appeal decision in mind.

[65] I consider the 2.1 reading to be new information that the Visa Officer is entitled to consider. However, new facts cannot be raised without regard to the context otherwise a continuous cycle of refusal and appeal can arise to frustrate applicants.

[66] The Visa Officer made his inquiries via the site visit and the email follow-up. Dr. Khan responded to both. On July 24, 2010, Dr. Khan also provided a report "To whom It May Concern". On that day he had assessed Mrs. Ashraf's renal function using two different laboratory centres. He found her serum creatinine level to test at 1.36 mg/dl (Apollo Hospitals) and 1.4 gm/dl (Square Hospitals Ltd.). Copies of the laboratory results were appended. It does not appear Dr. Khan's report was ever provided to the Visa Officer.

[67] The IAD considered the situation where Mrs. Ashraf's condition was stable and her medical requirements did not vary. If the Visa Officer is satisfied with Dr. Khan's opinion that Mrs. Ashraf's condition is stable, then I should think the Visa Officer is bound by the IAD decision. If the Visa

Officer accepts the medical section view that the state of Mrs. Ashraf's health is deteriorating because of kidney failure, then the Visa Officer is obligated to provide a fairness letter to the Applicants.

[68] I conclude the Visa Officer never made the decision he was required to make. Instead he requested a further medical report and subsequently denied the application for permanent residence on the basis that the Applicants had not complied with sections 16(1) and 16(2)(b) of the *IRPA*.

Conclusion

[69] I consider the application for mandamus as moot as events have overtaken this application with the decision of the Visa Officer dismissing the application for permanent residence. The application for mandamus is dismissed.

[70] I am dismissing the application for a prohibition since I have held the Visa Officer is entitled to consider the new medical information. It lies within the visa Officer's discretion to evaluate the facts before him and determine whether the IAD decision is applicable or not.

[71] I decline to make any further order given that the Applicants have appealed the Visa Officer's decision to the IAD. Section 72 provides for an application for judicial review with respect to any matter except where any right of appeal has not been exhausted.

[72] Finally, this matter has arisen because of the actions of the Respondent in failing to properly record the IAD on the record in a timely manner, in raising a fraud allegation which it then abandoned, and in failing to act when the facts and information were before it when the occasion arose. As a result, there has been an application for leave and judicial review (the mandamus and prohibition applications), an injunction motion, and a motion for dismissal due to mootness.

[73] The Applicants seek costs in the amount of $20,000. In the circumstances of this application, I award the Applicants costs in the amount of $4,000.

[74] The Applicants sought to propose a certified question of general importance. The Respondents opposed the application on the basis that the issues are fact based. I do not see a question of general importance arising on the circumstances of this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the application for mandamus is dismissed;
2. the application for a prohibition is dismissed;
3. no further order is made; and
4. costs are awarded to the Applicants in the amount of $4,000.
5. no question of general importance is certified.

"Leonard S. Mandamin"
Judge

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4752-10
STYLE OF CAUSE:	RABIUL MOHAMMED ASHRAF ET AL. v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 12, 2011
AMENDED REASONS FOR JUDGMENT AND JUDGMENT:	MANDAMIN J.
DATED:	DECEMBER 13, 2011

APPEARANCES:

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