Federal Court of Appeal

Cour d'appel fédérale

Date: 20110201

Docket: A-115-10

Citation: 2011 FCA 35

CORAM: **DAWSON J.A.**
LAYDEN-STEVENSON J.A.
STRATAS J.A.

BETWEEN:

VITHAL SAPRU; AMITA SAPRU
RADIKA SAPRU; RISHI SAPRU

Appellants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on December 14, 2010.

Judgment delivered at Ottawa, Ontario, on February 1, 2011.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: LAYDEN-STEVENSON J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] This appeal raises important questions concerning the responsibility of a medical officer when considering medical admissibility under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("Act") and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("Regulations"). Specifically, in considering an applicant's ability and intent to mitigate excessive demand on social services, what inquiries must a medical officer make and when? Thereafter, must a medical officer provide an immigration officer with adequate reasons for the medical

officer’s opinion that a foreign national’s health condition might reasonably be expected to cause excessive demand on social services in Canada?

[2] The questions arise on an appeal from a decision of the Federal Court: 2010 FC 240. The Judge of the Federal Court certified as serious questions of general importance the following two questions:

a. When considering whether a person is inadmissible on health grounds pursuant to paragraph 38(1)(*c*) of the Act, is a Medical Officer obligated to actively seek information about the applicants' ability and intent to mitigate excessive demand on social services from the outset of the inquiry, or is it sufficient for the Medical Officer to provide a Fairness Letter and rely on the applicants' response to that letter?

b. Is a Medical Officer under a duty to provide adequate reasons for finding that a person is inadmissible on health grounds pursuant to paragraph 38(1)(*c*) of the Act, which is independent from the Visa Officer's duty to provide reasons and which is therefore not satisfied by the Visa Officer providing reasons that are clearly adequate?

1. Factual Background

[3] Mr. Vithal Sapru, an engineer by profession, applied for status as a permanent resident in Canada as a member of the Skilled Worker class. Included in his application were his wife Amita, a pediatrician, and their children Radika and Rishi. Mr. Sapru and his family members were each required to submit to a medical examination.

[4] A medical officer reviewed the results of the medical examinations. She completed a Medical Notification (IMM 5365) in which she diagnosed Rishi as suffering from an intellectual disability. Based on her review of the results of the medical examination and all the reports she had

received, the medical officer concluded that Rishi "has a health condition that might reasonably be expected to cause excessive demand on social services" in Canada. More particularly, the officer wrote:

> This 8 year old applicant, born Oct 18, 2001, has Developmental Delay. He has psychomotor delay and delay in speech development secondary to perinatal hypoxia. His MRI shows reduction in the volume of white matter with delayed myelination. His mental Age on the Binet-Simon-Indian adaptation, is 4 years with an Intelligence Quotient of 60-65. He is currently dependent on his family for most of the activities of daily living and is delayed in most adaptive skills. The consultant states that Rishi is a special child who will require special care and special education.
>
> 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 intervention program to deal with his medical issues and address his adaptive skills deficiencies.
>
> He, and his supporting family, as appropriate, will likely require a variety of social services, in particular, special education until the age of 21 years, speech therapy, and other services promoting relative independence that focus on acquisition of basic living skills and autonomy to the greatest degree possible. Training and support will likely be needed for communication, self care, functional academics, home living, social and community skills and health and safety. Those services will also include access to a spectrum of supervised settings, parent/family relief programs and respite care for care givers. His requirement for the above mentioned multi-disciplinary services and for special education extending through his teenage years is costly.
>
> 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.

[5] The medical officer went on to provide a detailed list of the social services she believed would be required by Rishi and their costs.

[6] In reaching this opinion, the medical officer did not conduct an individualized assessment of Rishi's likely demand for social services (as opposed to his eligibility for such services). This individualized assessment of likely demand was mandated 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. The medical officer did not conduct the required individualized assessment because, until the decision of this Court in *Colaco v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 282, Citizenship and Immigration Canada took the view that *Hilewitz* did not apply to applications for permanent residence made in the Skilled Worker class. See: Citizenship and Immigration Canada, Operational Bulletin 063.

[7] After a designated immigration officer (immigration officer) received the Medical Notification, he wrote to Mr. Sapru advising of the concern that Rishi was a person whose health condition might reasonably be expected to cause excessive demand on health or social services in Canada (Fairness Letter). The Fairness Letter repeated *verbatim* from the Medical Notification the diagnosis and particulars of the medical condition that Rishi was said to suffer from and the social services he was said to require. The Fairness Letter invited Mr. Sapru to submit additional information that addressed any or all of the following items:

- the medical condition identified in the Fairness Letter
- the social services likely to be required in Canada as identified in the Fairness Letter

- the family’s individualized plan to ensure that no excessive demand would be imposed on Canadian social services for a five-year period accompanied by a signed "Declaration of Ability and Intent" form.

[8] The Fairness Letter instructed that:

> In order to demonstrate that 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 immigration to Canada.

[9] A response (Fairness Response) was provided to the Fairness Letter. Dr. Sapru, Rishi's mother, acknowledged that her son was “developmentally delayed” but, based on "the two letters which I enclose herewith and which represent the advice you were given as to his general state" she took issue with the seriousness of the condition.

[10] Dr. Sapru also took issue with the level of social services it was said Rishi would require in Canada and with what she characterized as the “generic” non-individualized assessment. She advised that in Canada Rishi would be sent to a private school at the family's expense and that she would also home school him because she would be unable to pursue her profession in Canada. An indemnity agreement signed by Mr. Sapru, his wife, and also Mr. Sapru's brother and sister-in-law who reside in Ontario was provided. This agreement purported to indemnify the Ontario Ministers of Education and Health for a period of five years in the event Rishi went to public school or sought

physiotherapy services paid for by the Province of Ontario. No completed "Declaration of Ability and Intent" form was provided.

[11] As well, Mr. Sapru's brother-in-law in Canada provided an affidavit in which he swore, among other things, that he would provide the use of a home in Ontario to his brother and his family upon their arrival in Canada.

[12] The Fairness Response was sent to the medical officer for review and consideration. A Procedural Fairness assessment was then completed by the medical officer and sent to the immigration officer. In the Procedural Fairness assessment the medical officer listed the additional documents she had reviewed in the Fairness Response. She then wrote:

> I have reviewed our medical file for the above-named Foreign National along with the additional material listed above and it is my opinion that no information has been provided which would indicate that the original immigration medical assessment was incorrect. Therefore there is insufficient evidence to support a change or re-evaluation of this Foreign National's medical assessment at this time. Hence remains M5.

[13] The tribunal record contains no letter, note, e-mail or other writing that explains how the medical officer analysed the information provided in the Fairness Response or her basis for concluding that the Fairness Response contained no information that would lead the medical officer to the view that her original assessment was incorrect.

[14] By letter dated June 11, 2009 (Decision Letter), the immigration officer advised Mr. Sapru that he did not meet the requirements for permanent residence in Canada because Rishi was

inadmissible on health grounds. In the Decision Letter the immigration officer repeated *verbatim* the information concerning the diagnosis and condition as described in both the Medical Notification and the Fairness Letter. He then wrote:

> By letter dated December 9, 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 assessments and confirmed the finding of inadmissibility.
>
> I am satisfied that the medical officer's opinion about your family member's (Rishi Sapru) inadmissibility on health grounds is reasonable. Accordingly, your accompanying family member, Rishi Sapru, is inadmissible pursuant to section 38(1)(c) in that your accompanying family member's condition might reasonably be expected to cause excessive demand on health or social services.
>
> [emphasis added]

[15] The Computer Assisted Immigration Processing System (CAIPS) notes show the immigration officer's acceptance of the opinion of the medical officer that Rishi remained inadmissible on health grounds.

[16] The CAIPS notes also record the immigration officer's concerns that Mr. Sapru had not provided a credible plan for offsetting the excessive demand Rishi would place on social services. For example, the immigration officer was not satisfied that Dr. Sapru would stay at home to care for Rishi (because she had worked continuously since 1992), he found the offer of a family home made by the brother-in-law was not credible, and, because Rishi sees specialists in India, the immigration officer was of the view Rishi would likely continue to see medical specialists in Canada. In his view, the indemnity agreement was not sufficient to establish that Rishi would not impose an excessive demand on Canadian social services.

2. Decision of the Federal Court

[17] After setting out the factual background, the decisions of the medical and immigration officers and the issues before the Federal Court, the Judge began his analysis. He began by considering the standard of review. The Judge noted that the applicants alleged that the medical officer had failed to comply with the obligations explained by the Supreme Court in *Hilewitz*. The Judge found this to be an issue of law which should be reviewed on the standard of correctness. The medical and non-medical conclusions of the officers were to be reviewed on the standard of reasonableness.

[18] The Judge went on to reach the following conclusions which are relevant to this appeal:

i. It is the obligation of the medical officer to perform a complete analysis of all of the medical and non-medical factors relevant to the issue of excessive demand on social services. The immigration officer must then review the medical officer's decision to ensure that all relevant factors were considered by a medical officer (paragraphs 23-26).

ii. The Judge relied upon an affidavit sworn by the medical officer in the application for judicial review to conclude that the medical officer had considered the non-medical evidence concerning the ability and intent of the family to offset any excessive demand on social services (paragraphs 27-30 and 34).

iii. At the time she made her initial assessment the medical officer was not required to make any inquiries into the applicants' ability and intent to offset any excessive demand. The applicants were in the best position to provide evidence of their ability

and intent, and the Fairness Letter gave them a fair opportunity to do so (paragraph 35).

iv. The reasons of the medical officer were inadequate because they did not explain how she analysed the Fairness Response or how she reached her decision. However, the inadequacy of the medical officer's reasons was saved by the detailed reasons of the immigration officer. This was because Operational Bulletin 063 requires the immigration and medical officers to collaborate throughout the decision-making process. This allows the immigration officer to seek clarification from the medical officer at any time if concerned about the reasonableness or the completeness of the medical officer's decision. Further, the reasons of the immigration officer were sufficient to allow the applicants to understand why their application for permanent residence was refused. The applicants received a fair and transparent decision-making process (paragraphs 37-42).

3. Legislative Framework

[19] The provision of the Act of most relevance to this appeal is paragraph 38(1)(*c*) which provides that a foreign national is inadmissible if their health condition "might reasonably be expected to cause excessive demand on health or social services." Section 42 of the 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	*a*) l'interdiction de territoire frappant

member or, in prescribed circumstances, their non-accompanying family member is inadmissible; or	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.

[20] The Regulations amplify these provisions as follows. First, the term "excessive demand" is defined in subsection 1(1) of the Regulations as follows:

"excessive demand" means	« fardeau excessif » Se dit :
(*a*) a demand on health services or social services for which the anticipated costs would likely exceed average Canadian per capita health services and social services costs over a period of five consecutive years immediately following the most recent medical examination required by these Regulations, unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is no more than 10 consecutive years; or	*a*) de toute charge pour les services sociaux ou les services de santé dont le coût prévisible dépasse la moyenne, par habitant au Canada, des dépenses pour les services de santé et pour les services sociaux sur une période de cinq années consécutives suivant la plus récente visite médicale exigée par le présent règlement ou, s'il y a lieu de croire que des dépenses importantes devront probablement être faites après cette période, sur une période d'au plus dix années consécutives;
(*b*) 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.

[21] Next, paragraph 30(1)(*a*) requires foreign nationals applying for permanent residence and their family members to submit to a medical examination. Thereafter, subsection 30(4) of the Regulations requires:

30. (4) Every foreign national referred to in subsection (1) who seeks to enter Canada must hold a medical certificate, based on the most recent medical examination to which they were required to submit under that subsection within the previous 12 months, that indicates that their health condition is not likely to be a danger to public health or public safety and, unless subsection 38(2) of the Act applies, is not reasonably expected to cause excessive demand. [emphasis added]	30. (4) L'étranger visé au paragraphe (1) qui cherche à entrer au Canada doit être titulaire d'un certificat médical attestant, sur le fondement de la plus récente visite médicale à laquelle il a été requis de se soumettre aux termes de ce paragraphe dans les douze mois qui précèdent, que son état de santé ne constitue vraisemblablement pas un danger pour la santé ou la sécurité publiques et, sauf si le paragraphe 38(2) de la Loi s'applique, ne risque pas d'entraîner un fardeau excessif. [Non souligné dans l'original.]

[22] Section 34 the Regulations then directs the medical officer considering the foreign national's health condition as follows:

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	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*) any reports made by a health practitioner or medical laboratory with respect to the foreign national; and	*a*) tout rapport établi par un spécialiste de la santé ou par un laboratoire médical concernant l'étranger;
(*b*) any condition identified by the medical examination.	*b*) toute maladie détectée lors de la visite médicale.

[23] Finally, section 20 the Regulations dictates the following to the immigration officer:

20. 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 sections 29 to 34 and the officer concluded that the foreign national's health condition is likely to	20. L'agent chargé du contrôle conclut à l'interdiction de territoire de l'étranger pour motifs sanitaires si, à l'issue d'une évaluation, l'agent chargé de l'application des articles 29 à 34 a conclu que l'état de santé de l'étranger constitue vraisemblablement un danger pour la santé ou la sécurité publiques

be a danger to public health or public safety or might reasonably be expected to cause excessive demand.	ou risque d'entraîner un fardeau excessif.

4. Issues and Analysis

a. Standard of Review

[24] I agree with the respondent's submission that on appeal from a decision of the Federal Court on an application for judicial review the standard of appellate review is whether the Judge of the Federal Court selected the appropriate standard of review and then applied it correctly. See: *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, [2009] 4 C.T.C. 123.

[25] With respect to the selection of the standard of review by the Judge in this case, at paragraph 16 of his reasons the Judge wrote:

> In the case at bar, the applicants allege that the Medical Officer failed to comply with her obligations as set down in *Hilewitz*. That is an issue of law which should be reviewed on a standard of correctness. The applicants also raise issues of procedural fairness which should be reviewed on a correctness standard: *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539.

[26] The first certified question asks whether a medical officer is obliged by the Act and the decision of the Supreme Court in *Hilewitz* to actively seek relevant information from the outset of the medical officer's inquiry. In my view, the Judge correctly characterized this as a question of law reviewable on the correctness standard.

[27] The second certified question asks whether a medical officer is under a duty to provide adequate reasons. Again, I agree with the Judge that this is a question of what is required by the

principles of procedural fairness. No deference is owed by the Court on such questions. See: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404 at paragraph 53.

b. The First Certified Question

[28] For ease of reference I repeat the first certified question:

> When considering whether a person is inadmissible on health grounds pursuant to paragraph 38(1)(*c*) of the Act, is a Medical Officer obligated to actively seek information about the applicants' ability and intent to mitigate excessive demand on social services from the outset of the inquiry, or is it sufficient for the Medical Officer to provide a Fairness Letter and rely on the applicants' response to that letter?

[29] The appellants submit that a medical officer's initial assessment must be made with a view to providing the medical certificate. It follows, they submit, that in preparing the initial medical opinion a medical officer must be cognizant of the ultimate goal: to conduct an individualized assessment of the social services an applicant will require, whether those services will cause an excessive demand on social services in Canada, and whether it is possible for the applicant to offset or attenuate any excessive demand by personal contribution. To do so, the appellants say that a medical officer must seek out from the outset as much information as possible in order to make the necessary findings.

[30] The Judge dealt with this submission at paragraph 35 of his reasons where he wrote:

> […] The applicants are in the best position to provide evidence of their ability and intent, and they are given a fair opportunity to do so in the Fairness Letter. There is no reason that a Medical Officer should have to make an inquiry at an earlier stage, as long as she considers any Fairness Response carefully and with an open mind.

[31] In my view the Judge was correct, for the reasons that he gave. I would add one cautionary note. The Judge's conclusion was premised on the basis that the Fairness Letter gives an applicant "a fair opportunity" to respond to any concerns. This requires the Fairness Letter to set out clearly all of the relevant concerns so that an applicant knows the case to be met and has a true opportunity to meaningfully respond to all of the concerns of the medical officer.

[32] It follows that I would answer the first certified question as follows:

> A medical officer is not obligated to seek out information about the applicants' ability and intent to mitigate excessive demands on social services from the outset of the inquiry. It is sufficient for the medical officer to provide a Fairness Letter that clearly sets out all of the relevant concerns and provides a true opportunity to meaningfully respond to all of the concerns of the medical officer.

c. The Second Certified Question

[33] The second question asks:

> Is a Medical Officer under a duty to provide adequate reasons for finding that a person is inadmissible on health grounds pursuant to paragraph 38(1)(*c*) of the Act, which is independent from the Visa Officer's duty to provide reasons and which is therefore not satisfied by the Visa Officer providing reasons that are clearly adequate?

[34] The Judge dealt with this question as follows:

> 37 The second question is the extent to which the Medical Officer must provide reasons for her decision. The applicants assert that her reasons with respect to the non-medical evidence were inadequate. All she said was that she had considered every document contained in the Fairness Response and found that it did not change her original assessment.
>
> 38 I have no hesitation in finding these reasons inadequate. They do not explain how the Medical Officer analysed the Fairness Response or how she

reached her conclusions. However, the Visa Officer did provide detailed reasons for finding that the applicants do not have ability and intent. The question is whether this saves the Medical Officer's reasons.

39 The applicants submit that it does not, for two reasons. First, the Visa Officer must review the Medical Officer's decision and requires sufficient reasons from the Medical Officer to do so. Second, since the Medical Officer is the actual decision-maker, the applicants require her own reasons in order to understand why their application was refused.

40 With respect to the applicants' first argument, the Visa Officer is not in the position of a court on an application for judicial review, whose review must focus on the written reasons. According to Operational Bulletin 063, the Visa Officer and the Medical Officer should collaborate throughout the decision-making process. The Visa Officer may seek clarification from the Medical Officer at any time if concerned about the reasonableness or completeness of her decision. Thus, the Visa Officer does not require extensive reasons to review the Medical Officer's decision.

41 With respect to the applicants' second argument, it was recognized by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 that reasons can be provided by a person other than the actual decision-maker. According to the Supreme Court at paragraph 44 of *Baker*, this may be

> [. . .] part of the flexibility that is necessary, as emphasized by Macdonald and Lametti, above, when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways.

42 In the circumstances of this case, I am satisfied that the reasons provided by the Visa Officer are sufficient to allow the applicants to understand why their application for permanent residence was refused. The applicants received a fair and transparent decision-making process. This ground of judicial review cannot succeed. [emphasis added]

[35] To properly consider the second certified question, I begin by considering the respective roles of immigration officers and medical officers when assessing medical inadmissibility.

[36] The Judge, relying upon *Hilewitz* and subsection 30(4) of the Regulations, concluded that when considering the existence of excessive demand a medical officer must assess the likely demands to be made by an applicant upon social services. The Judge further found that when conducting this assessment the medical officer must take into account both medical and non-medical factors. I agree. To this I would add that the medical officer must provide the immigration officer with a medical opinion about any health condition an applicant has and the likely cost of treating the condition. When an applicant submits a plan for managing the condition, the medical officer must consider and advise the immigration officer about things such as the feasibility and availability of the plan. In every case, what is required of a medical officer will reflect the information before the medical officer. Therefore, this is not intended to be an exhaustive list of what is required of a medical officer in every case.

[37] As to the role of the immigration officer, the parties agree that an immigration officer must rely upon the opinion of a medical officer about medical matters, including the medical condition of an applicant, the likely cost of treating the medical condition and whether the applicant's health might reasonably be expected to cause excessive demand on social services. They also agree that before reliance can be placed on the opinion of a medical officer an immigration officer is required to ensure that the opinion provided by the medical officer is reasonable.

[38] In the submission of counsel for the Minister:

> 35. This Court, in jurisprudence dating back to some seminal decisions from the 1980s and 1990s, confirmed there is a duty of the visa officer to ensure that the medical opinion is reasonable. A medical opinion that is inconsistent to the point of

> incoherence, or which is expressed in terms of possibility rather than probability will be deficient. See, for example:
>
> *Ahir v. Canada (M.E.I.)*, [1984] 1 F.C. 1098 (C.A.)
> *Bola v. Canada (M.E.I.)*, (1990) 107 N.R. 311 (C.A.)
> *Hiramen v. Canada (M.E.I.)*, (1986), 65 N.R. 67 (C.A.)
> *Deol v. Canada (Minister of Employment and Immigration)*, (1992) 145 N.R. 156 (C.A.)

[39] I agree that this principle is well-established in the jurisprudence. For example, in *Hilewitz* the Supreme Court found, at paragraph 70, that the immigration officers in the two cases before the Court had "erred by confirming the medical officers' refusal to account for the potential impact of the families' willingness to assist." While the jurisprudence cited by the parties developed under the now repealed *Immigration Act*, R.S.C. 1985, c. I-2 (former Act), I am satisfied that the former Act and its associated regulations are sufficiently similar to the current legislative regime to make this case law applicable. I specifically note that just as section 20 of the Regulations requires an immigration officer to find a foreign national to be inadmissible when a medical officer has found that the foreign national's health condition might reasonably be expected to cause excessive demand, subparagraph 19(1)(*a*)(ii) of the former Act provided:

19. (1) No person shall be granted admission who is a member of any of the following classes:	19. (1) Les personnes suivantes appartiennent à une catégorie non admissible :
(*a*) persons, who are suffering from any disease, disorder, disability or other health impairment as a result of the nature, severity or probable duration of which, in the opinion of a medical officer concurred in by at least one other medical officer,	*a*) celles qui souffrent d'une maladie ou d'une invalidité dont la nature, la gravité ou la durée probable sont telles qu'un médecin agréé, dont l'avis est confirmé par au moins un autre médecin agréé, conclut :
[…]	. . .
(ii) their admission would cause or	(ii) soit que leur admission entraînerait

might reasonably be expected to cause excessive demands on health or social services; [emphasis added]	ou risquerait d'entraîner un fardeau excessif pour les services sociaux ou de santé; [Non souligné dans l'original.]

[40] The jurisprudence developed under the former Act established that a medical officer's opinion was not reasonable where, for example, a medical officer failed to conduct an individualized assessment as required by *Hilewitz*, or failed to consider all of the relevant information, or based his or her opinion on insufficient information, or provided an opinion that was incomplete, inconsistent or incoherent. The reasonableness of a medical opinion was to be assessed as at the time it was given and also as at the time it was relied upon by the immigration officer. See, for example, *Gao v. Canada (Minister of Employment and Immigration)* (1993), 61 F.T.R 65 (F.C.T.D.).

[41] Having reviewed the respective roles of the immigration and medical officers, it follows from the obligation placed on an immigration officer to review the reasonableness of a medical officer's opinion that a medical officer must provide the immigration officer with sufficient information to enable the immigration officer to be satisfied that the medical officer's opinion is reasonable.

[42] The particular circumstances of each case will dictate what is required for the immigration officer to be able to assess the reasonableness of the medical officer's opinion. For example, admissions by a foreign national contained in the Fairness Response, without more, would likely obviate the need for detailed reasons from the medical officer on that point. Further, a medical

officer may impart sufficient information to the immigration officer in a number of ways. For example, a medical officer may provide adequate reasons in a report to the immigration officer. However, adequate reasons could also be provided orally if the immigration officer records the oral advice in the CAIPS notes, or in a combination of written and oral communications where the oral advice is recorded in the CAIPS notes. Thus, a medical officer might transmit his or her notes reflecting the medical officer's review and assessment of all of the relevant information, or an immigration officer might record in the CAIPS notes the relevant observations and conclusions of a medical officer made during the course of the collaborative process between the officers contemplated by Operational Bulletin 063. In every case, an immigration officer may seek clarification from a medical officer and record the response of the medical officer in the CAIPS notes. The reasons of a medical officer may be conveyed to an immigration officer by a combination of these or other methods.

[43] What is important is that at the time the immigration officer makes his or her decision on admissibility, the immigration officer must have sufficient information from the medical officer to allow the immigration officer to be satisfied that the medical officer's opinion is reasonable.

[44] It follows from this that I would answer the second certified question as follows:

> When assessing whether a foreign national's health condition might reasonably be expected to cause excessive demand, a medical officer is under a duty to provide sufficient information to an immigration officer to allow the immigration officer to be satisfied that the medical officer's opinion is reasonable.

d. Application of these principles to the present case

[45] The Judge found the reasons of the medical officer to be inadequate. I agree. No challenge is made on this appeal to the Judge's characterization of the reasons of the medical officer as inadequate.

[46] The Judge went on to hold, however, that the inadequacy of the medical officer's reasons was "saved" by the detailed reasons of the immigration officer. The Judge's reasons for that conclusion are found in paragraphs 39 to 42 of his reasons, which are quoted above at paragraph 34.

[47] For the following reasons I respectfully disagree with the Judge's conclusion that the inadequacies of the medical officer's reasons were overcome by the reasons of the immigration officer.

[48] First, the immigration officer was under an obligation to assess the reasonableness of the medical officer's opinion. No meaningful assessment could be performed on the basis of the inadequate reasons of the medical officer. On the facts of this case it is especially relevant to recall that the immigration officer must be presumed to have known that, pursuant to Citizenship and Immigration Canada policy, the medical officer's initial assessment which led to the Fairness Letter was not the individualized assessment mandated by *Hilewitz*. This was underscored in the Fairness Response, where Dr. Sapru complained of the generic nature of the medical officer's assessment. With knowledge of that defect in the initial assessment it was particularly important for the

immigration officer to satisfy himself that the medical officer had performed the requisite individualized assessment. There was nothing before the immigration officer that could reasonably have led him to that conclusion.

[49] Second, the Judge relied upon Operational Bulletin 063 which states that "[i]mmigration and medical officers should work closely together during the process [of assessing excessive demand on social services] and document this collaboration." However, there is no documentation of such a collaborative process in the certified tribunal record in the present case. The sole reference to any communication between the officers is an entry in the CAIPS notes that records a conversation between the two officers prior to receipt of the Fairness Response.

[50] Finally, the Judge's conclusion may well have been influenced by his prior finding that the medical officer "considered the non-medical evidence in this case as she was required to do". The Judge's finding was based upon the statement in the medical officer's reasons that the medical officer had read the Fairness Response and also upon the affidavit of the medical officer filed in the application for judicial review. In that affidavit the medical officer stated that she had considered the applicants' ability and intent to manage Rishi's needs.

[51] As the Judge recognized, the medical officer's statement in her reasons to the effect that she had read the Fairness Response was insufficient to render her reasons adequate. Little weight can be given to such a generic statement that is silent about what the medical officer did, and whether the principles articulated in *Hilewitz* were applied.

[52] With respect to the affidavit of the medical officer, in my view the Judge's reliance upon this affidavit was problematic in two respects. First, the information contained in the affidavit was not before the immigration officer when he was assessing the reasonableness of the medical officer's opinion. It was the duty of the immigration officer to assess the reasonableness of the medical opinion. Second, as candidly acknowledged by counsel for the Minister in oral argument, an affidavit cannot be used to bolster the reasons of a decision-maker on judicial review. In this Court, Justice Pelletier wrote for the majority in *Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255:

> 45 The application judge may have been lead to that conclusion by the nature of the affidavit filed by the Minister's delegate. While the letter setting out the reasons for the refusal of Mr. Sellathurai's request deals only with the evidence of the legitimacy of the source of the seized funds, the Minister's delegate filed an affidavit in which he restated and reviewed the grounds for suspicion identified by the customs officer, and indicated why he believed they remained unanswered. In my view, this form of affidavit is inappropriate and ought not to have been given any weight at all.
>
> 46 The judges of the Federal Court have previously stated that a tribunal or a decision-maker cannot improve upon the reasons given to the applicant by means of the affidavit filed in the judicial review proceedings. In *Simmonds v. Canada (Minister of National Revenue)*, 2006 FC 130, 289 F.T.R. 15, Dawson J. wrote at paragraph 22 of her reasons:
>
> > I observe the transparency in decision-making is not promoted by allowing decision-makers to supplement their reasons after the fact in affidavits.
>
> 47 See to the same effect *Kalra v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 941, 29 Imm. L.R. (3d) 208, at para. 15; *Yue v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 717, [2006] F.C.J. No. 914, at para. 3; *bin Abdullah v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1185, [2006] F.C.J. No. 1482, at para. 13. Any other approach to this issue allows tribunals to remedy a defect in their decision by filing further and better reasons in the form of an affidavit. In those circumstances, an applicant for judicial review is being asked to hit a moving target. [emphasis added]

[53] No weight should have been given to the affidavit of the medical officer to the extent the officer sought to explain or bolster her reasons.

[54] To conclude on this issue, when considering the inadequacy of the reasons of a medical officer the primary concern is not whether at the end of the day the appellants received adequate reasons. The concern is whether the inadequacy of the reasons prevented the immigration officer from assessing the reasonableness of the medical officer's opinion.

[55] One further issue must be considered. The respondent argued forcefully that on the facts of this case the inadequacy of the medical officer's reasons was not material because the immigration officer's reasons were not dependent on the reasons of the medical officer. Specifically, the respondent argued that the appellants acknowledged in the Fairness Response the existence of Rishi's special needs, but then failed to provide a proper plan for attenuating the demands flowing from the special needs. In short, the respondent argued that the immigration officer made his decision based upon non-medical factors because reasons were not provided concerning the medical factors.

[56] Despite Mr. McClenaghan's articulate submissions, I have not been persuaded that the immigration officer's reasons were independent of the medical opinion. I begin by noting that in the Decision Letter sent to the appellants, no reference was made to the Fairness Response or to any admission made therein. The contents of the Decision Letter are described at paragraph 14 above.

The immigration officer stated in the Decision Letter that he was satisfied that the medical officer's decision was reasonable.

[57] The immigration officer did refer to the Fairness Response in the CAIPS notes when setting out more detailed reasons for his decision. There, he wrote:

> PI's spouse, who is a paediatrician, states, in her un-dated letter, that our medical assessment is generic and not individualised. At the same time she states that she does not dispute that Rishi has developmental delay. PI did not provide any medical info which may suggest he has any issues with the medical assessments of the dep. We requested him to provide a declaration of ability and intent. He failed to submit the declaration. I am not satisfied that his supporting plan is credible because of the following reasons:
>
> […]
>
> Based on the medical assessments and the info provided by the applicant in response to the procedural fairness letter I am satisfied that the medical officer's opinion about PI family member's inadmissibility on health grounds is reasonable. Accordingly, he is inadmissible pursuant to A38(1)(c) in that PI's above-stated accompanying family member's condition might reasonably be expected to cause excessive demand on health or social services. [emphasis added]

[58] It can be seen from the latter passage that the immigration officer did have regard to the medical assessments.

[59] Equally important to the consideration of the immigration officer's reasons is that in the first paragraph of the CAIPS notes quoted above, the immigration officer erred when he stated that the applicants did not provide any medical information that suggested they had any issue with the medical assessment of Rishi.

[60] As explained above, Dr. Sapru, while acknowledging the existence of some developmental delay, did take issue with the medical assessment. She wrote:

> Your opinion makes it look as if my son's condition is far more serious than it really is. His actual condition is mild as described from the two letters which I enclose herewith and which represent the advice you were given as to his general state.

[61] The two letters referred to appear to be a reference to reports found at pages 640 and 641 of the Appeal Book, Volume II. The first report was prepared by an Epileptologist and Child Neurologist who certified Rishi to have "microcephaly with mild learning difficulty." He went on to say that Rishi "has gained milestones with a good catchup and goes to normal school and takes part in all activities. He has low normal intelligence and may be able to continue [and] cope with routines of normal school." The second report was prepared by a "Consultant Developmental Paediatrician" together with an "Honorary Professor & Director, Dept. of Pediatrics & Neonatology" at a hospital for children with special needs. In their joint opinion, Rishi has "mild developmental delay, microcephaly and mild concentration issues." They said that he "is currently going to a main stream school" and felt that with consistent effort he would make good progress.

[62] This is to be contrasted with the Medical Notification, which described Rishi's condition to include being "currently dependent on his family for most of the activities of daily living" and therefore to require special care and special education. The relevant portion of the Medical Notification is found at paragraph 4 above.

[63] The issue as to the seriousness of Rishi's disability was one that the immigration officer was not qualified to decide. It was for the medical officer to assess the totality of the evidence and then

give valid reasons for her views as to the seriousness of any disability, what if any special needs would flow from that disability and the likely cost of meeting those needs. The immigration officer's reasons were not independent of the medical opinion, such as it was. Without a proper medical opinion as to Rishi's condition and any resultant special needs it was premature for the immigration officer to assess the adequacy of the appellants' plan.

5. Conclusion and Costs

[64] For these reasons, I would allow the appeal and set aside the decision of the Federal Court. Pronouncing the judgment the Federal Court should have given, I would set aside the decision of the immigration officer and remit the matter to another immigration officer to be redetermined on the basis of a valid medical opinion prepared by a different medical officer. I would answer the certified questions as follows:

> Q. When considering whether a person is inadmissible on health grounds pursuant to paragraph 38(1)(*c*) of the Act, is a Medical Officer obligated to actively seek information about the applicants' ability and intent to mitigate excessive demand on social services from the outset of the inquiry, or is it sufficient for the Medical Officer to provide a Fairness Letter and rely on the applicants' response to that letter?
>
> A. A medical officer is not obligated to seek out information about the applicants' ability and intent to mitigate excessive demands on social services from the outset of the inquiry. It is sufficient for the medical officer to provide a Fairness Letter that clearly sets out all of the relevant concerns and provides a true opportunity to meaningfully respond to all of the concerns of the medical officer.
>
> Q. Is a Medical Officer under a duty to provide adequate reasons for finding that a person is inadmissible on health grounds pursuant to paragraph 38(1)(*c*) of the Act, which is independent from the Visa Officer's duty to provide reasons and which is therefore not satisfied by the Visa Officer providing reasons that are clearly adequate?

A. When assessing whether a foreign national's health condition might reasonably be expected to cause excessive demand, a medical officer is under a duty to provide sufficient information to an immigration officer to allow the immigration officer to be satisfied that the medical officer's opinion is reasonable.

[65] The appellants seek costs, arguing that special reasons exist to justify such an award. However, the appellants did not seek costs in their notice of appeal or in their memorandum of fact and law. While this is a sufficient basis for denying costs, I would add that I see no special reasons for awarding costs. In my view, nothing in the conduct of the respondent merits an award of costs. In the scheme of Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, a mere error on the part of a decision-maker is insufficient to warrant an award of costs.

"Eleanor R. Dawson"
J.A.

"I agree.
Carolyn Layden-Stevenson J.A."

"I agree.
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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