Federal Court  Cour fédérale

Date: 20100302

Docket: IMM-4112-09

Citation: 2010 FC 240

Ottawa, Ontario, March 2, 2010

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

VITHAL SAPRU
AMITA SAPRU
RADIKA SAPRU
RISHI SAPRU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to Section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of a Designated Immigration Officer at the High Commission of Canada in New Delhi, India (the Visa Officer) dated June 11, 2009. It was determined that the principal applicant is inadmissible to Canada because his son Rishi, an accompanying family member, has a health condition which might reasonably be expected to cause excessive demand on social services in Canada.

BACKGROUND AND THE DECISIONS UNDER REVIEW

[2] The applicants are a family from India. The principal applicant, Vithal Sapru, is an engineer and has operated his own business since 1989. His wife Amita Sapru (Amita) is a pediatrician. Their two children, Radika (15 years old) and Rishi (8 years old), would accompany them to Canada.

[3] Vithal Sapru applied for permanent residence in Canada on June 27, 2002 as a member of the Skilled Worker class. In connection with his application, he and all of his accompanying family members had to undergo medical examinations.

[4] The results of the examinations were reviewed by a medical officer (the Medical Officer) at the Health Management Branch of Citizenship and Immigration Canada (CIC). The Medical Officer determined that Rishi suffers from developmental delay, including psychomotor delay and delay in speech development. At age 8, he had a mental age of 4 years and an I.Q. between 60 and 65. The Medical Officer determined that Rishi is likely to require a variety of social services in Canada. She provided detailed reasons for reaching these conclusions.

[5] In a letter to the applicants dated December 8, 2008 (the Fairness Letter), the Visa Officer reported the Medical Officer's conclusions and expressed a preliminary determination that Rishi is inadmissible to Canada on health grounds. The Fairness Letter invited the applicants to provide additional information on Rishi's medical condition, social services required, and/or "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."

[6] The applicants made submissions on the extent of Rishi's condition, the social services he would require, and their ability and intent to pay for social services (the Fairness Response). They did not submit a Declaration of Ability and Intent.

[7] On June 8, 2009, the Medical Officer wrote brief reasons indicating that she had reviewed the entire Fairness Response, and had determined that it did not change her original assessment that Rishi is inadmissible to Canada.

[8] The Visa Officer refused the applicants' application for permanent residence in a decision dated June 11, 2009. The Visa Officer adopted the detailed reasons in the Medical Officer's original assessment as to the extent of Rishi's condition and the social services he would likely require. The Visa Officer then considered in some detail whether the applicants had the ability and intent to mitigate Rishi's excessive demand on social services ("ability and intent").

[9] The Visa Officer was not satisfied of the applicants' intent to offset excessive demand because their "plan" for doing so was not credible, for the following reasons:

a. The applicants say Amita will stay home to take care of Rishi, but this is unlikely since she has worked or been self-employed continuously since 1992;

b. Rishi already sees specialists in India, so he is likely to continue doing so;

c. Vithal Sapru's brother's offer to give the family a house is not credible;

d. The applicants provided a brochure from a physiotherapy provider called Footprints, but this is not an adequate individualized “plan”;

e. The applicants provided an indemnity agreement that purports to indemnify the Ontario Ministers of Health and Education for any social services costs Rishi requires. However, it has not been signed by the Ministers and is not binding;

f. There was no clear individualized “plan” provided at all.

[10] The Visa Officer also found that there was insufficient evidence provided of the applicants’ financial ability to offset excessive demand. The Fairness Response did not contain any financial details. Previous financial evidence appears on file but is either outdated or not sufficiently detailed.

ISSUES

[11] Several issues have been raised on this application for judicial review. I would restate them as follows:

a. What is the appropriate standard of review?

b. What are the respective obligations of a Medical Officer and a Visa Officer with respect to the consideration of non-medical factors that might mitigate an applicant’s excessive demand on social services? Did the Medical Officer meet her obligations in this case?

c. Were the applicants given adequate procedural fairness?

d. Were the Officers’ medical conclusions reasonable?

e. Were the Officers' non-medical conclusions reasonable?

ANALYSIS

Standard of Review

[12] The decision under review is the Visa Officer's decision dated June 11, 2009. However, as I discuss below, the Visa Officer's primary role is to review the Medical Officer's decision. To assess whether that has been done lawfully, the Court must consider the decision of the Medical Officer.

[13] In my recent decision in *Rashid v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 157, I had occasion to consider the appropriate standard of review to be applied to the decisions of Visa Officers and Medical Officers on medical inadmissibility. I concluded that a Visa Officer's factual findings should be given significant deference by the Court. With respect to the standard of review for a Medical Officer's decision, I held as follows at paragraphs 14 and 15:

> In *Gao v. Canada (Minister of Employment and Immigration)*, (1993), 61 F.T.R. 65, [1993] F.C.J. No. 114, at pp. 317-318, Justice Dubé had discussed the standard of review of a finding of fact made by a medical officer in the following terms:
>
> > Most of the case law relating to medical inadmissibility decisions by visa or Immigration Officers has issued from appellate bodies. The general principles arising from these cases are of course relevant to a judicial review application seeking to quash an Immigration Officer's decision.
> >
> > The governing principle arising from this body of jurisprudence is that reviewing or appellate courts are not competent to make findings of fact related to the medical diagnosis, but are competent to review the evidence to determine whether the medical officers' opinion is reasonable in the circumstances of the case. *Canada (M.E.I.) v. Jiwanpuri* (1990), 109 N.R. 293 (F.C.A.). The reasonableness of a medical opinion is to be assessed not only as of the time it was given,

> but also as of the time it was relied upon by the Immigration Officer, since it is that decision which is being reviewed or appealed, *Jiwanpuri*. The grounds of unreasonableness include incoherence or inconsistency, absence of supporting evidence, failure to consider cogent evidence, or failure to consider the factors stipulated in section 22 of the Regulations. [some citations removed].

> In *Barnash v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 842, [2009] F.C.J. No. 990, at para. 20, Justice Mandamin referred to *Gao* in holding that given the specialized nature of the medical officer's opinion, reasonableness is the appropriate standard of review for the factual component of the decision. I agree with that conclusion.

[14] In contrast to the approach taken in *Rashid*, *Gao* and *Barnash*, cases such as *Rounta v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 384, *Sarkar v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1556 and *Kirec v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 800 have applied a standard of correctness to decisions of Visa Officers and Medical Officers. These cases rely on the Supreme Court of Canada's decision in *Hilewitz v. Canada (Minister of Citizenship and Immigration); De Jong v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 706 (*Hilewitz*).

[15] In my opinion, it is clear from paragraph 71 of *Hilewitz* that the Supreme Court adopted a standard of correctness because the case turned on clear questions of law. I do not think that the Supreme Court intended to impose a standard of correctness on decisions of Visa Officers or Medical Officers that were essentially factual. In my view, the proper standard of review for the Officers' factual findings is reasonableness, for the reasons given in *Rashid*, *Gao* and *Barnash*.

[16] 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. In other words, this standard should apply to issues (b) and (c).

[17] On the other hand, issues (d) and (e) concern the content of the Officers' decisions, which are essentially factual. Those issues will be considered on a standard of reasonableness.

Obligations of Medical Officers and Visa Officers

[18] The applicants submit that the Medical Officer conducted a generic assessment of Rishi's condition and his likely demand on social services in Canada. They assert that she failed to take into account non-medical factors such as the applicants' ability and intent to mitigate Rishi's excessive demand.

[19] The Supreme Court of Canada in *Hilewitz* recognized that an individualized assessment is required to determine excessive demand. It is now well established that both medical and non-medical factors must be taken into account. In the case at bar, the Visa Officer provided a detailed analysis of the applicants' ability and intent. The applicants submit that is not good enough, because assessing excessive demand is the Medical Officer's responsibility.

[20] Recent jurisprudence has been divided on which of the two officers bears this responsibility. In *Airapetyan v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 42, the Court required "visa officers to take into account a family's willingness to pay . . ." (My emphasis). Similar

language appears in *Canada (Minister of Citizenship and Immigration) v. Abdul*, 2009 FC 967 at paragraph 24.

[21] On the other hand, *Sarkar*, above, at paragraph 20 and *Ching-Chu v. Canada (Minister of Citizenship and Immigration)* 2007 FC 855 at paragraph 15 suggest that both Visa Officers and Medical Officers must consider non-medical factors.

[22] *Jafarian v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 40 at paragraph 29 seems to place the responsibility squarely on the Visa Officer. In my view, however, *Jafarian* focuses on the Visa Officer's obligation to review the Medical Officer's decision. The reasoning in *Jafarian* does not necessarily excuse the Medical Officer from considering ability and intent.

[23] I would resolve these ambiguities by referring to the Supreme Court of Canada's most recent pronouncement on the issue. At paragraph 70 of *Hilewitz*, the Supreme Court held as follows:

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

[24] In light of *Hilewitz*, I agree with the applicants that it is the Medical Officer's obligation to perform a complete analysis of all factors, medical and non-medical. The Visa Officer must then review the Medical Officer's decision to ensure that all relevant factors were considered.

[25] I am supported in this view by subsection 30(4) and section 20 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). Subsection 30(4) provides that in order to enter Canada, a foreign national requires a medical certificate indicating that he or she is unlikely to place excessive demand on social services. Since issuing a certificate is a decision that can only be made by a doctor, it is important that the Medical Officer take into account all factors that are relevant to an excessive demand determination. It is not enough for a Visa Officer, who is not a doctor, to consider these issues.

[26] Section 20 of the Regulations provides that where a Medical Officer determines that a person will create excessive demand, the Visa Officer must find the person inadmissible. This interpretation is clearest from the French text of that section, which provides as follows:

> 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 ou risque d'entraîner un fardeau excessif.

Thus, the Visa Officer does not necessarily have the authority to overrule the Medical Officer. For that reason, in my view, it is essential that the Medical Officer takes into account all relevant factors, including non-medical ones.

[27] The respondent does not seriously contest that the Medical Officer must consider ability and intent, but submits that she did so in this case. On that point, I agree with the respondent.

[28] Computer Assisted Immigration Processing System ("CAIPS") notes provide the Medical Officer's reasons, written on June 8, 2009, in which she acknowledged every document in the Fairness Response, and stated she had considered all of them. These documents constituted the

applicants' submissions on ability and intent. As well, in her affidavit sworn December 23, 2009, the Medical Officer stated that she had considered the applicants' ability and intent.

[29] In cross-examination on her affidavit, the Medical Officer admitted that she had made her original medical assessment without considering non-medical factors, as she had believed then that

Hilewitz did not apply to applicants in the Skilled Worker category. However, she testified that by the time she considered the Fairness Response, the Department of Citizenship and Immigration ("CIC") had issued Operational Bulletin 063 which confirmed that non-medical factors had to be considered in all cases (see *Colaco v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 282). The Medical Officer confirmed that she had considered those factors when evaluating the Fairness Response. In my opinion, her consideration of non-medical factors at that stage was sufficient to discharge her duty under *Hilewitz*.

[30] The Medical Officer also stated during cross-examination that as a practice, she will consider evidence of the applicants' ability and intent, and she will presume that the evidence is trustworthy. She will then rely on the Visa Officer to confirm the authenticity of the evidence. For that reason, the Visa Officer must make the final decision. With respect to the applicants' able arguments, I cannot conclude that this practice infringes *Hilewitz*. By considering the non-medical evidence as being *prima facie* authentic, the Medical Officer takes into account all relevant factors and evidence, as *Hilewitz* requires.

[31] The applicants criticize Operational Bulletin 063 for institutionalizing practices that violate *Hilewitz*. According to the Bulletin, a Medical Officer will review the Fairness Response to

determine whether the applicants' "plan" for mitigating excessive demand is feasible from a medical point of view. If not, there is no need to consider the ability and intent question. If the "plan" is feasible, however, then the ability and intent question is referred to the Visa Officer.

[32] I agree with the applicants that the Bulletin's approach, as stated, is problematic because, if it was followed, the Medical Officer would be unable to consider ability and intent. However, I accept the Medical Officer's affidavit and cross-examination evidence on how the policy has been interpreted in practice. She does not only decide whether the "plan" is feasible from a medical point of view, but also from the point of view of the applicants' ability and intent to carry it out, presuming the relevant evidence to be authentic. Thus, although the policy as written is problematic, I am not convinced that it led to an actual error in this case.

[33] I do not make any comment on CIC's most recent policies, contained in Operational Bulletin 063B, because they were not yet in force when the decision was made in the case at bar. The Court will have to consider Operational Bulletin 063B when the appropriate case arises.

[34] For all of these reasons, I am satisfied that the Medical Officer considered the non-medical evidence in this case as she was required to do.

[35] This application raises two additional questions about the Medical Officer's responsibilities. The first is the extent to which she must inquire into the applicants' ability and intent. The applicants say that she should have actively sought this information when making her original

medical assessment, the same way that she would seek medical information by conducting an examination or issuing a "furtherance." With respect, I am not persuaded that this is necessary. 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.

[36] The applicants submit that in *Abdul*, above, Justice Kelen held that a Fairness Letter is not a sufficient means of seeking information about ability and intent. In my view, this submission misinterprets Justice Kelen's decision, which merely found that the particular letter in that case was not detailed enough to elicit the information the Medical Officer needed. The Fairness Letter in the case at bar was considerably more detailed, and I am satisfied that it indicated exactly the sort of information that the Medical Officer needed to make a proper decision: "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."

[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.

Procedural Fairness

[43] The applicants point to language in the Fairness Letter which appears to suggest that the Visa Officer had already come to a final decision, before the applicants had an opportunity to make submissions on ability and intent. I am satisfied that on a reading of the Fairness Letter as a whole, it is clear that a final decision had not yet been made. The Visa Officer said that it "appears" Rishi "may" be inadmissible. The letter went on to provide 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; 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 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.

[44] In my view, the applicants were given a full opportunity to make submissions on the medical opinion and on non-medical factors such as ability and intent.

[45] I am also satisfied that the Fairness Letter makes it clear the Medical Officer will be considering the excessive demand question. The Visa Officer consistently uses "I" to refer to himself, so the statement that the "assessing officer" will assess excessive demand can only refer to the Medical Officer.

The Officers' Medical Conclusions

[46] The Medical Officer's medical conclusions were reproduced verbatim in the Visa Officer's decision. The applicants criticize these conclusions because they exaggerate the severity of Rishi's condition and state that many more social services will be required than is actually necessary.

[47] With respect to Rishi's diagnosis, the Medical Officer stated as follows:

> 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 mental Age . . . 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.

[48] On the standard of review of reasonableness, I find that there was sufficient evidence on which the Medical Officer could reach these conclusions. The statement that Rishi is delayed in "most" adaptive skills is, in my view, a reasonable interpretation of the psychological report that appears at pages M-92 through M-94 of the Certified Tribunal Record.

[49] The Medical Officer then listed the social services Rishi would require. I agree with the applicants that it does not appear likely that Rishi will actually require all of them. However, the evidence does support the conclusion that Rishi will require special education, and in that context will likely require an assessment by a multi-disciplinary team to establish an individualized

schooling program for him. As well, the applicants admit that Rishi will require speech therapy and occupational therapy. The evidence also establishes that subject to the applicants' ability and intent to mitigate them, the costs of these necessary services would constitute an excessive demand on Canadian social services.

[50] For these reasons, I conclude that even if the Medical Officer overestimated the extent to which Rishi would require social services in Canada, that error was not material. There was clear evidence that Rishi will actually require many social services, the costs of which will constitute excessive demand unless Rishi's family is able and willing to mitigate them. I can find no reason to interfere with the Medical Officer's medical conclusions.

The Officers' Conclusions on Non-Medical Factors (Ability and Intent)

[51] As indicated above, I accept the Visa Officer's reasons as the reasons for decision on the non-medical issues. The question before the Officers was whether, on a balance of probabilities, the applicants had the ability and intent to mitigate the excessive demand that Rishi's health condition would otherwise be likely to place on Canadian social services. The Visa Officer was not satisfied that the applicants had either the ability or a credible "plan" for avoiding excessive demand.

[52] The applicants did not submit a formal "plan," but the Fairness Response indicates what they consider the "plan" to be. Its centrepiece is an indemnity agreement that purports to indemnify the Ontario Ministers of Health and Education for the cost of any social services that Rishi will require.

[53] In *Jafarian*, above, Justice Harrington held that "[a]n undertaking not to call upon the government to pay what it is obliged to pay under statute is simply not enforceable" (para. 25; see also *Deol v. Canada (Minister of Citizenship and Immigration.)*, 2002 FCA 271 at para. 46). While both *Jafarian* and *Deol* dealt with health services, in my view a commitment to pay for social services is similarly unenforceable where the services in question are guaranteed to all residents of the relevant province. In Ontario, the province in which the applicants intend to live, free special education in the public school system is guaranteed to all residents who require it: see sections 8(3), 32(1), 33 and 36 of Ontario's *Education Act*, R.S.O. 1990, c. E.2.

[54] The applicants' plan extended beyond the unenforceable indemnity agreement. Amita's letter contained in the Fairness Response says that any demand on the public school system will be avoided because Rishi will be placed in a private Montessori school program, combined with home-schooling that Amita will provide. The affidavit of Vimal Sapru, who is Rishi's uncle, was also contained in the Fairness Response and noted that Vimal Sapru had "personally made enquiries at the Merle L. Levine Academy Inc. 4630 Dufferin St. Suite 318, Toronto, Ontario, M3H 5S4. The yearly fees for these schools are between $20,000 and $25,000." These elements of the "plan" are significant because according to the Fairness Letter, the largest social service costs that Rishi is likely to incur are for special education in Ontario's public school system.

[55] According to the "plan," Rishi will also receive physiotherapy or occupational therapy privately through an organization called Footprints.

[56] In my view, the Visa Officer was reasonable in concluding that this "plan" is not credible. As the respondent stressed in oral argument, there is no evidence that either the Montessori school under consideration or the Merle L. Levine Academy offer programs that are appropriate for Rishi's particular needs. As well, there is no evidence that either school is willing to accept Rishi as a student. While I accept Vimal Sapru's affidavit evidence that he "personally made enquiries" at the Merle L. Levine Academy, there is no evidence as to the results of those enquiries. The Medical Officer noted these concerns during cross-examination on her affidavit. Similarly, the Visa Officer reasonably concluded that providing a brochure for Footprints did not constitute an adequate "individualised plan."

[57] There was a suggestion by the applicants in oral argument that the Visa Officer should have given them an opportunity to respond to these concerns. In this instance I am satisfied that the Officers' concerns are ones that the applicants should have anticipated. The Fairness Letter refers to a plan that is "individualized" and "workable"; the applicants should have known that listing names of schools and providing a brochure, without further detail, would not be sufficient. The onus is on the applicants to provide sufficient evidence to persuade the Officers. Therefore, in the circumstances of this case, the Officers did not have to raise their concerns with the applicants: *Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 872.

[58] To the extent the "plan" relies not on private schooling and physiotherapy, but on home schooling and other services provided by Amita, I find the Visa Officer was reasonable in finding this not to be credible. Rishi is certainly fortunate that his mother is a pediatrician, but there is no evidence that Amita has expertise in speech therapy, occupational therapy, or the educational needs

of a child with developmental delay. Furthermore, the Visa Officer found that Amita was more likely than not to seek work outside of the home rather than staying home to care for Rishi. This conclusion was not unreasonable given that Amita has been either employed or self-employed continuously since 1992.

[59] Since the applicants provided no credible "plan" for mitigating Rishi's excessive demand on social services, there is no need to consider whether they have the ability to carry out a "plan."

[60] For all of these reasons, I conclude that the Visa Officer did not make any errors which would warrant the Court's intervention. The application for judicial review will be dismissed.

THE PROPOSED CERTIFIED QUESTIONS

[61] The applicants have proposed the following seven questions for certification as serious questions of general importance to the legal system:

a. Does the failure of the medical officer in this case to either conduct or direct the focus of the necessary inquiry herself vitiate her medical opinion?

b. Does the participation of the visa officer in the decision making as is contemplated by Operational Bulletin 063B fetter the discretion of the medical officer and the opinion to be reached under R. 30(4) [of the Regulations]?

c. Is the medical officer under no obligation to answer the submissions made in the fairness response by the applicant where they attempt to rebut those findings which were reached without enquiry as indicated by paragraph 61 of the reasons in *Poste v. Canada*?

d. Is the statement made by Justice Dubé in *Gao v. Canada* about limitations of review by an immigration [officer] of a medical opinion an accurate statement of law or has that statement been altered by the case of *Dunsmuir v. Canada*, or alternatively is there any conflict in the two theories of deference?

e. Is it necessary, with respect to criticisms of the plan put forward by the family of Rishi under oath sufficiently responsive to the medical opinion or should there be greater direction by the visa officer as to the extent of the plan?

f. If there are any questions in the mind of the medical officer or the visa officer about what appears as a prima facie attempt to provide a plan, the visa officer has the power to ask for further documentation or evidence. Since this is the first look at the plan by an official, should he not be entitled to provide the answer to any question raised by the officer as to any further detail required?

g. Does the fairness response cure or satisfy the obligation to conduct an enquiry or does Mr. Justice Kelen in *Abdul v. Canada* express a correct view of the law to the extent that the form utilized is not clear enough to constitute an enquiry?

[62] The respondent objects to the certification of any of these questions on the ground that the applicants have done what the Federal Court of Appeal cautioned against in *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, that is, drafting a “laundry list” of questions that do not transcend the interests of the parties.

[63] The test for certification of a question is that it must be of general importance, transcend the interests of the parties and would be dispositive of an appeal: *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89. The respondent submits that while questions (b), (d) and (g) would appear to transcend the interests of the parties involved, they would not be dispositive of an appeal in this case.

[64] I find question (a) ambiguous. If it refers to the Medical Officer's obligation to consider all relevant factors herself, I have accepted the applicants' argument that she must do so. That finding is not dispositive since I decided the Medical Officer has done so.

[65] If, however, the question is asking whether a Medical Officer must actively inquire into ability and intent using a "furtherance" or similar device, rather than relying on the applicants' Fairness Response, that question may transcend the present case and be dispositive of an appeal.

[66] I would not certify question (b) because no argument about fettering discretion was made before me and because Operational Bulletin 063B was not in force at the material time.

[67] The wording of question (c) is convoluted, but it appears to ask whether the Medical Officer has a duty to provide sufficient reasons, above and beyond that of the Visa Officer. I find that a question along these lines would be dispositive of an appeal and would be of general importance.

[68] I do not think question (d) would be dispositive of an appeal and would not certify it.

[69] If question (e) is asking whether the Fairness Letter ought to have given greater direction as to the contents of the required "plan," it does not transcend the facts of the present case. The question of whether or not a Fairness Letter provides sufficient guidance depends on the wording of the particular letter.

[70] Question (f) asks whether, after receiving the applicants' "plan," the Officers must give the applicants an opportunity to respond to their concerns. In my opinion, this question should not be certified at this time because it appears well settled in the jurisprudence that in cases such as the one at bar, where a decision-maker's concern goes to the sufficiency of evidence and could have been anticipated, there is no obligation to seek clarification from the applicants: see *Selliah, above*.

[71] Finally, question (g) assumes an interpretation of Justice Kelen's decision in *Abdul* that, in my view, cannot be correct. Contrary to the applicants' assertion, Justice Kelen was only criticizing the wording of the particular Fairness Letter in that case. As the sufficiency of a Fairness Letter depends on the wording of the particular letter, this is not a question that can transcend the facts of the present case to become a question of general importance. For that reason I will not certify it.

[72] In conclusion, I would certify modified versions of questions (a) and (c), with their wording changed so that the questions are not tied to the facts of the present case.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application for judicial review is hereby dismissed.

THIS COURT ORDERS that the following questions are certified as serious questions of general importance:

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?

" Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4112-09
STYLE OF CAUSE:	VITHAL SAPRU AMITA SAPRU RADIKA SAPRU RISHI SAPRU and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 18, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	March 2, 2010

APPEARANCES:

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Michael Butterfield	FOR THE RESPONDENT

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