Federal Court  Cour fédérale

**Date: 20110708**

**Docket: IMM-4081-10**

**Citation: 2011 FC 854**

**Ottawa, Ontario, July 8, 2011**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**CICELY ALMINDA CRAMER and**
**WINSTON ANDREW SAMUEL CRAMER and**
**GRACE ADIA CRAMER and**
**JOSHUA EMANUEL CRAMER**
**by their litigation guardian**
**CICELY ALMINDA CRAMER**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] Cicely Alminda Cramer sought permanent residence in Canada as a skilled worker. Her application, together with those of her husband Winston and their two children, Grace and Joshua, was denied because the visa officer considered that Grace suffered from a health condition that

might reasonably be expected to cause an excessive demand on health and social services in Canada. Cicely and her family would otherwise have qualified as her points tally was well above the pass mark on the scale used by Citizenship and Immigration, Canada.

[2] The problem identified by the visa officer was that Grace suffers from developmental delay issues. At birth she was slow to breathe and suffered mild cerebral palsy. Physically speaking, she is completely healthy. At the time of the medical assessment for the purposes of the application, she was 11 years old (she is now 12 years old); however she has been found to function at a year or two below her chronological age. Up until grade 4 of her school life, Grace attended regular educational institutions. In grade 5, she was placed in a special school; however in grade 6 she returned to a regular school institution.

[3] In response to a fairness letter sent in September, 2009, the applicants provided a plan for Grace that included keeping her in a normal class room environment at a private school and continued home therapy from her parents, who had been trained by specialists to conduct such sessions. From time to time, they would seek assessments from professionals in Canada in order to upgrade their therapy skills.

[4] Parental support would be augmented by assistance from Grace’s grandparents with whom the family intended to reside. Other relatives in Canada pledged financial and other support. These relatives had many years of experience in education in Canada and abroad. The principal of the private school wrote to say that the school was prepared to work closely with the family to ensure that Grace reached her full potential.

[5] The officer considered that this plan was inadequate as it did not include an estimated cost of social services to be used. The officer further highlighted that it was not clear what the backup plan would be if Grace's grandparents were to become infirm or die as they were both approximately 70 years of age. The medical officer reviewed the file and was of the opinion that the submitted plan did not alter the initial determination of medical inadmissibility.

[6] The issues raised on this application for judicial review were whether there was a breach of procedural fairness and whether the visa officer's decision was reasonable. While it is the visa officer's decision that is under review, the Court must also consider the opinion of the medical officer (*Sapru v. Canada (Minister of Citizenship and Immigration)* 2011 FCA 35, 93 Imm. L.R. (3d) 167 para. 54). In the particular circumstances of this case, I found it difficult to assess the reasonableness of the visa officer's opinion that Grace's needs could be expected to place an excessive demand on social services as it was not clear from the record.

[7] Where procedural fairness is in question, the proper approach is to ask whether the requirements of natural justice in the particular circumstances of the case have been met. Deference is not called for. The question is not whether the decision was "correct" but whether the procedure used was fair. See: *Ontario (Commissioner Provincial Police) v. MacDonald*, 2009 ONCA 805, 3 Admin L.R. (5th) 278 at para. 37 and *Bowater Mersey Paper Co. v. Communications, Energy and Paperworkers Union of Canada, Local 141*, 2010 NSCA 19, 3 Admin L.R. (5th) 261 at paras. 30-32.

[8] The content of the duty of fairness owed applicants where medical inadmissibility is raised can be difficult for a visa officer to determine even with the assistance of a medical officer. But it is clear since the decision of the Supreme Court of Canada in *Hilewitz v. Canada (Minister of Citizenship and Immigration)* [2005] 2 S.C.R. 706, 33 Admin. L.R. (4th) 1, that the willingness and capacity of the family to pay for any required programs must be taken into consideration. Here, that does not appear to me to have been done.

[9] As stated by the Supreme Court at paragraph 42 of *Hilewitz*, excessive demand is inherently evaluative and comparative. As a result, officers must assess likely demands on social services, not mere eligibility for them. The Court emphasized individual rather than generic assessments, attaching a cost to the individual rather than to the disability on a standard of reasonable probability. Implicit in that assessment is a determination of what the availability and costs of the required programs might reasonably be expected to be. In the present matter, that information does not appear in the record.

[10] No information was provided by the visa officer in the fairness letter as to the availability, scarcity or costs of any programs that Grace might need, other than a reference to an Ontario Special Grant made to schools with students requiring significant special education services. Indeed, it is clear that the officer placed the burden on the applicants to provide such information and found the application wanting when they did not include it in their plan. The officer further mischaracterized the applicants' plan as demonstrating an intention to seek social and health services when that was not proposed, based on her potential eligibility for special education, speech

therapy, occupational therapy and respite care in Ontario. Eligibility, in itself, is not the standard. There must be a reasonable probability that the programs would be required.

[11] The applicants had provided as much information as they could, by providing a statement of their available funds, their support network, and by stating that their plans were to conduct therapy at home and to send Grace to private school. The applicants also provided detailed information regarding the school they intended to send her to, as well as a letter from the principal confirming the feasibility of this plan and his commitment to help Grace and her family cope with her disadvantages.

[12] In assessing the reasonable probability of excessive demand, the medical officer's opinion on which the visa officer relies must be sufficient to explain the decision to the parties, provide public accountability and permit effective review: *Parmar v. Canada (Minister of Citizenship and Immigration)* [2010] FC 723, paragraph 45. Here, there is effectively no reasons in support of the medical officer's opinion on record other than a passing reference in the Computer Assisted Immigration Processing System (CAIPS) notes as follows:

> MOF reviewed file and of the opinion that submission does not alter initial medical inadmissibility

[13] This statement does not provide any information as to why the medical officer considered that Grace was inadmissible. As noted recently by the Federal Court of Appeal in *Sapru*, above, at paragraph 54, when considering the reasons supporting a medical officer's opinion, the concern is whether any inadequacy prevented the visa officer from assessing the reasonableness of the opinion. Statements by the medical officer in *Sapru*, similar to that here, were found to be insufficient and to

constitute a breach of procedural fairness that could not be “saved” by the greater detail provided in the visa officer’s CAIPS notes.

[14] In the particular circumstances of this case, the failure of the visa officer to identify what additional costs were considered to constitute excessive demand in the fairness letter and the inadequacy of the medical officer’s reasons amount to a denial of natural justice. Accordingly, this application will be granted and the matter remitted for reconsideration by a different officer.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application is granted and the matter is remitted for reconsideration by a different officer. No questions are certified.

"Richard G. Mosley"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-4081-10 |
| **STYLE OF CAUSE:** | CICELY ALMINDA CRAMER and<br>WINSTON ANDREW SAMUEL CRAMER and<br>GRACE ADIA CRAMER and<br>JOSHUA EMANUEL CRAMER<br>by their litigation guardian<br>CICELY ALMINDA CRAMER<br><br>and<br><br>THE MINISTER OF CITIZENSHIP<br>AND IMMIGRATION |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | March 2, 2011 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | MOSLEY J. |
| **DATED:** | July 8, 2011 |

**APPEARANCES:**

| | |
|---|---|
| Ronald Poulton | FOR THE APPLICANT |
| Stephan Gold | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| RONALD POULTON<br>Barrister and Solicitor<br>Toronto, Ontario | FOR THE APPLICANT |
| MYLES J. KIRVAN<br>Deputy Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |