Federal Court  Cour fédérale

Date: 20120503

Docket: IMM-5788-11
IMM-5790-11

Citation: 2012 FC 521

Ottawa, Ontario, May 3, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

GORDON ROSENBERRY;
MURIEL ROSENBERRY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION **Respondent**

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] These reasons deal with two applications under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act) for judicial review of two decisions of an immigration officer (Officer), dated 6 July 2011, which refused the Applicants' request for permanent residence

on humanitarian and compassionate (H&C) grounds under subsection 25(1) of the Act (H&C Decision) and refused their application for Temporary Residence Permits (TRP Decision).

BACKGROUND

[2] The Applicants are both citizens of the United States of America (USA) who currently live in Edmonton without status. The Male Applicant is 85 years old and the Female Applicant is 87 years old. Before coming to Canada, the Applicants lived in Albany, California. Their daughter (Janice), a permanent resident of Canada, also lives in Edmonton, while their two sons live in the USA.

[3] Janice filed a Family Class sponsorship application to bring the Applicants to Canada on 18 December 2007 (Family Class Application). Shortly after this application was received, Citizenship and Immigration Canada (CIC) advised her that the Family Class Application would likely take a long time to process. As of 23 February 2011, CIC was still processing the Family Class Application.

[4] While the Family Class Application was still pending, the Applicants sold their home in California, bought a house in Edmonton, and shipped their belongings there. In May 2008, the Applicants twice attempted to enter Canada through Kingsgate, British Colombia. On their first attempt, the Male Applicant told an officer of the Canada Border Services Agency (CBSA) that he and his wife wanted to live with Janice in Edmonton and they had no intention of returning to the USA. The CBSA officer telephoned Janice, who said her parents could live with her brothers in California. The CBSA officer found the Applicants were not genuine visitors to the USA and so he denied them entry.

[5] On their second attempt to enter Canada, the Male Applicant told another CBSA officer they had nothing to return to in the USA and it would be impossible for the Applicants to re-establish themselves there. The second CBSA officer also denied them entry, finding they were not genuine visitors. After they were refused entry on this occasion, the Applicants travelled to Seattle and went to the Canadian Consulate (Consulate) there. Although they sought assistance in entering Canada at the Consulate, none was forthcoming. The Applicants then went to California, stayed there for ten days, and returned to Seattle. The Applicants sold their car in Seattle because it seemed prudent at the time.

[6] After selling their car, the Applicants had a friend drive them across the border into Canada sometime in June 2008. When they crossed the border, the CBSA officer present asked to see their passports, admitted them to Canada as visitors, and told them to have a nice trip. Once in Canada, the Applicants travelled to Vancouver, where they booked flights to Edmonton. The Applicants flew to Edmonton and remain there to this day.

[7] The Applicants applied to extend their stay in Canada on 17 November 2008. An immigration officer in Edmonton interviewed the Applicants on 9 July 2009 (2009 Interview). The immigration officer conducting the interview (Korzenowski) noted that the Female Applicant was incoherent, smiled, and moaned. Korzenowski said in her notes it appeared the Female Applicant had major health and medical issues which the Applicants had not disclosed in their application to extend their stay. She excused the Female Applicant from the interview room when it became apparent she could not participate.

[8] After the interview, Korzenowski denied the Applicants' request to extend their stay in Canada. In a refusal letter, dated 14 July 2009, she noted she had considered the reasons for their

original entry and request for an extension, their financial means for return and an extended stay in Canada, their ties to the USA, and the probability they would leave Canada at the end of their authorized stay. Korzenowski found there were insufficient grounds to extend their stay. She informed the Applicants they were required to leave Canada immediately and issued them voluntary departure confirmation certificates.

[9] The Applicants respondent to Korzenowski's decision by letter dated 21 July 2009. They noted they had filed an application for H&C relief prior to asking an extension of their stay, which was still outstanding (see below). They also said they could not return to Canada and that "if Canadian immigration law related to sponsoring parents worked properly, this situation would not have developed." They informed Korzenowski they would make every attempt to block their removal through the judicial process.

[10] As a result of the 2009 Interview, Korzenowski issued inadmissibility reports against the Applicants under subsection 44(1) of the Act. These reports led a Minster's delegate to issue removal orders against the Applicants on 31 July 2009. They applied for judicial review of the decision to issue exclusion orders against them. Justice John O'Keefe dismissed their application for judicial review on 8 September 2010 (see *Rosenberry v Canada (Minister of Citizenship and Immigration)* 2010 FC 882).

[11] On 8 July 2009, CIC received the Applicants' application for permanent residence on H&C grounds (H&C Application). At the same time, Janice filed an Application to Sponsor and Undertaking – form IMM 1344 – and a Sponsorship Agreement – form IMM 1344 B – to support the H&C Application. The Applicants also made written submissions in which they said they did not have a support system in place in the USA and Janice was the only one of their children who

was interested in taking care of them. They also said their stay in Canada underlined the failings of the Canadian immigration system, in that the delay in processing their Family Class Application drove them to come to Canada and live here without status.

[12] With their written submissions, the Applicants provided a letter from Dr. Robert Carter – the Applicants' family physician in Edmonton (Carter Letter). The Carter Letter said the Female Applicant suffers from advanced Alzheimer's disease and that, though she required care from the Male Applicant and Janice, Canada's health care system had not borne any of the costs for her care. The Carter Letter also indicated that the Female Applicant's medical needs exerted a significant burden on her family and she would eventually require institutionalized care. The Carter Letter concluded that the Female Applicant would require increased health care and could become a burden on Canada's health care system.

[13] The Applicants provided additional submissions to the Officer on 2 October 2009. At this time, they submitted a report from Bonnie Patterson-Payne, a social worker practicing in Edmonton (Social Worker Report), and a letter from Jeanne Hackama, the Director of Care at Open Arms Family Care Ltd. – the private care home to which the Female Applicant had been admitted (Hackama Letter). The Hackama Letter indicated the Female Applicant is unable to speak for herself and needs total physical care.

[14] The Social Worker Report indicated that Janice was concerned about the Female Applicant's condition and that the cost of the Female Applicant's care in Canada was approximately $2900 per month, where the same level of care would cost $8000 per month in the USA. The Social Worker Report also noted that in Edmonton the Male Applicant had the support of a group of Plymouth Brethren – a Christian sect of which he is a member.

[15] A medical officer at CIC (Quevillon) issued a Medical Notification to the Female Applicant on 4 November 2009. The Medical Notification indicated that if she were permitted to enter Canada, the Female Applicant might reasonably be expected to cause excessive demands on Canada's health or social services. Quevillon found the Female Applicant had advanced Alzheimer's disease and her condition would deteriorate over time so that she would eventually require 24 hour care. Quevillon also found the Female Applicant's condition might reasonably be expected to require services which would cost more than the average Canadian per-capita cost over five years. Quevillon concluded the Female Applicant was inadmissible under paragraph 38(1)(*c*) of the Act.

[16] The Applicants applied for TRPs on 22 September 2010 (TRP Application). In the Male Applicant's submissions, he noted the Female Applicant was in a nursing home under 24-hour care. He said there was no prospect for improvement, so the Applicants could not relocate. He also said they posed no danger to Canada and would not place a burden on Canada's health care system because they were paying for their own care. The Male Applicant said he had not yet received word on the Family Class Application. The Female Applicant's application form indicated the Applicants wished to stay in Canada until the Family Class Application was considered. The Applicants also made written submissions in support of their TRP Application in which they said they had little support to return to in the USA and Janice was the only child who would be able to care for them. They said a TRP was the fairest way for Canada to address their circumstances. According to the Applicants, to march the 80-year-old Male Applicant out of Canada with his wife carried on a stretcher behind him would demonstrate a complete collapse in Canadian humanity and reasonableness.

[17] The Officer informed the Applicants on 27 April 2011 that the TRP Application would be processed along with the H&C Application. He also informed them he believed the Female Applicant was inadmissible to Canada under subsection 38(1) of the Act and invited them to make submissions on this issue. In submissions dated 24 May 2011, the Applicants gave the Officer financial information to show their ability to pay for the services the Female Applicant would require. They noted they were currently paying for her medical attention and said they had sufficient resources to continue to fund her care. The Applicants also provided the Officer with a Declaration of Ability and Intent, dated 15 May 2011, in which the Male Applicant declared he would not hold provincial authorities responsible for the cost of social services. He also declared he would assume responsibility for arranging the provision of the required social services. The Applicants asked the Officer to exercise discretion in their case and give significant weight to their ability to pay for the Female Applicant's continuing needs.

[18] The Officer considered the Applicants' submissions on the H&C Application and made the H&C Decision on 6 July 2011. He was not satisfied unusual and undeserved or disproportionate hardship would result to the Applicants if their H&C Application were denied, so he refused their application.

[19] After considering the Applicants' H&C Application, the Officer considered whether to grant them a TRP under subsection 24(1) of the Act. On 6 July 2011, he wrote a memorandum (Memorandum) to the Director of CIC (Director) in which the Officer decided against granting the Applicants TRPs. The Officer's supervisor agreed with his findings and endorsed the Memorandum on 14 July 2011. The Director concurred with the TRP Decision and endorsed the Memorandum on 21 July 2011.

[20] The Officer notified the Applicants of the TRP Decision and H&C Decision by letter dated 21 July 2011. The Applicants applied for leave and judicial review of both decisions on 25 August 2011. Justice Michael Kelen granted leave on 30 December 2011 and ordered that the applications be heard together.

DECISIONS UNDER REVIEW

H&C Decision

[21] The H&C Decision consists of the letter the Officer sent to the Applicants on 21 July 2011 (Refusal Letter) and his Reasons for Decision (H&C Reasons), signed 6 July 2011. The Refusal Letter indicates the Officer considered and rejected both the H&C and TRP applications.

[22] The Officer began by reviewing the Applicants' biographical information and their history with CIC. He then reviewed the factors they put forward in their claim. The Officer noted the Applicants relied on their establishment in Canada related to the home they have here, the proximity to their daughter, and the Female Applicant's medical condition. They also put forward the Male Applicant's connection to the Plymouth Brethren community in Ottawa, their sons' practical inability to care for them, and their financial situation.

[23] The Officer briefly reviewed the impact of his Decision on any children directly affected, finding the Applicants had not put forward any information to show how their grandchildren would be affected by the H&C decision. The Officer also reviewed concerns about the Applicants' health. He noted Quevillon's finding the Female Applicant was medically inadmissible because of her advanced Alzheimer's disease. He also noted the Applicants submissions on this issue made in response to the Fairness Letter. The Officer said the Male Applicant underwent an immigration

medical examination, after which he was designated M3. An M3 designation meant the Male Applicant had a condition for which the potential demand on health or social services is not sufficient to exclude him under paragraph 38(1)(*c*) of the Act.

Analysis

[24] The Officer found he was not satisfied there were sufficient H&C grounds in the Applicants' case to grant them an exemption under section 25 of the Act.

Immigration History

[25] The Officer noted the Applicants entered Canada in June 2008 after twice being refused entry because they were not genuine visitors. He noted they had disposed of their home in California and moved their assets to Canada before coming here in 2008. Further, he noted Janice was notified about the lengthy delays in processing parental sponsorship applications. The Officer said the letter CIC sent Janice after she filed her sponsorship application informed her about processing times, but did not suggest the Applicants should come to Canada before their application was processed. The Officer also referred to the 2009 Interview in which the Male Applicant described their repeated attempts to get into Canada.

[26] The Officer found the Applicants' efforts to get into Canada indicated persistence and a willingness to do whatever it took to get into Canada. They continued trying to get into Canada even though they were aware, from their refusals at the border, that they were not qualified to enter. He also found that, even if they initially tried to enter Canada in ignorance of the requirements on them, their entry in June 2008 appeared to have been planned to circumvent the immigration process. The

Officer found they should have known in June 2008 that they would have to clarify their intentions at the border, but they did not do so.

[27] The Officer then noted that, after the 2009 Interview, CIC issued removal orders against them and they had applied for judicial review of the process for issuing the removal orders. The Officer found the Applicants chose to remain in Canada instead of making other arrangements for their care in the USA. The Officer found the Applicants were determined not to follow the standard route for immigration but had done whatever it took to stay in Canada.

[28] The Officer also analysed the Applicants' motivation for coming to Canada. He found they have several family members in the USA and the Social Worker Report did not indicate any abuse at the hands of their American family. He also found there was insufficient evidence the Applicants could not move within the USA to be closer to their sons. The Officer noted the Applicants do not live with their daughter in Canada; the Male Applicant lives on his own and the Female Applicant lives in a care facility. In their submissions, the Applicants raised the Male Applicant's connection to the Plymouth Brethren community in Edmonton and the Social Worker Report said the support of this community was not available to him in the USA. However, the Officer questioned how the Male Applicant managed to get by without this support while he was in the USA and what had made it necessary to have the support of the community in Canada.

[29] The Officer found there was no justifiable reason for the Applicants to have rushed their move to Canada. He also found there was no reason they could not return to the USA pending the outcome of their Family Class Application.

[30] The Officer also found the motivating factor behind the Applicants move to Canada seemed to be the Female Applicant's medical condition. He said information before him clearly showed the Female Applicant was diagnosed with Alzheimer's disease as early as 2005. The Officer found that, by the time the Applicants came to Canada in 2008, the Female Applicant's condition had progressed to the point that the Officers noted her dementia when they attempted to enter Canada. Further, at the 2009 Interview, Korzenowski mentioned that the Female Applicant was incoherent, moaned, and smiled quite a bit. The Officer also referred to the Medical Notification, and noted he had sent the Applicants a fairness letter. Although the Applicants made submissions on the Female Applicant's medical inadmissibility, the Officer found the information they submitted did not modify her medical inadmissibility.

[31] The Officer also noted the Applicants advised him they were paying for the Female Applicant's medical care and had sufficient funds to pay for her care. The Officer said he chose not to pursue the medical inadmissibility issue; he said his purpose in reviewing it was to show how the Female Applicant's condition was a significant, underlying motivation in the Applicants' decision to come to Canada. He questioned why, even though the Applicants were currently paying for the Female Applicant's care, they should get into Canada ahead of others by jumping the queue. The Officer also noted that, independent of the medical inadmissibility, the Applicants were subject to outstanding removal orders.

Conclusion

[32] The Officer found the Female Applicant's family knew about her condition two to three years before the Applicants came to Canada. He found their actions prior to coming to Canada showed a willingness to bypass the rules when it was expedient and in their best interests to do so.

Although it was understandable they had anticipated her condition might deteriorate to the point she would be clearly inadmissible to Canada, the Officer found that the option of coming to Canada became more attractive as the Female Applicant's condition deteriorated. Given the Applicants' financial resources, he found they had not shown they could not avail themselves of adequate medical care and housing in the USA.

[33] Given the way they had pursued immigration to Canada, the Officer was not satisfied the Applicants were credible or trustworthy. The means by which they sought immigration to Canada and an extension of their visitor status appeared to be an attempt to reduce the impact of the Female Applicant's condition. Further, the plan the Applicants submitted to show how they would pay for the Female Applicant's care did not contain details of any future care. The Officer was not convinced that the Male Applicant would be both willing and able to follow through on his commitment to cover the costs of the Female Applicant's care. Although the Applicants said CIC's lengthy processing times were to blame for their circumstances, the Officer found they were advised of these processing times and their circumstances were of their own making.

TRP Application

[34] The TRP Decision consists of the Refusal Letter and the Memorandum in which the Officer gave reasons for his Decision.

[35] The Officer said in the Refusal Letter he had carefully and sympathetically reviewed the TRP Application, but concluded there were insufficient grounds to merit the issue of a TRP. The Officer then informed the Applicants that CBSA would contact them to make arrangements for their removal.

[36] In the Memorandum, the Officer noted the Male Applicant's statement in the TRP Application that the Applicants posed no danger to Canada and would not be inadmissible.

[37] The Officer also noted that he had considered and refused the H&C Application. He said the H&C Application presented no reason for the Applicants to stay in Canada. The Officer also noted their Family Class Application was still outstanding and no action had been taken on the file since 23 February 2011. He said the length of time the Family Class Application would take was not relevant because the Female Applicant's medical inadmissibility was a major factor in refusing the H&C Application.

[38] As in the H&C Decision, the Officer found the information they Applicants' submitted in response to the Fairness Letter did not change the Female Applicant's medical inadmissibility. He found she is in need of 24-hour care but found no reason why a suitable means of returning her to the USA could not be arranged. The Officer also noted the Male Applicant's previous immigration medical exam had expired and said that, given the Male Applicant's age, there was a reasonable possibility he might be medically inadmissible.

[39] The Officer concluded that, given the timing and means by which the Applicants came to Canada, their circumstances were of their own making. He said there was no likelihood of permanent residence any time soon and that prolonging their stay in Canada could end up making their situation even worse. The Officer recommended the Director not issue TRPs to the Applicants.

[40] Beside his endorsement, the Supervisor wrote "medically inadmissible. Inadmissibility still outweighs any H&Cs that may exist. Deliberate circumvent [*sic*] the law. [exclusion orders] exist."

ISSUES

[41] The Applicants raise the following issues in this case:

- **a.** Whether the Officer properly considered all the evidence;
- **b.** Whether the Officer properly assessed hardship in the H&C Application;
- **c.** Whether the Officer's reasons are inadequate;
- **d.** Whether the Officer breached their right to procedural fairness;
- **e.** Whether the Officer improperly applied CIC's manual *IP-5 – Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* (H&C Guidelines) or *IP1 – Temporary Resident Permits* (TRP Guidelines);
- **f.** Whether the Officer was biased.

STANDARD OF REVIEW

[42] The Supreme Court of Canada in *Dunsmuir v New Brunswick* 2008 SCC 9 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[43] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Supreme Court of Canada held that, when reviewing an H&C decision, "considerable deference should be accorded to immigration Officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the

fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language" (paragraph 62). Justice Michael Phelan followed this approach in *Thandal v Canada (Minister of Citizenship and Immigration)* 2008 FC 489, at paragraph 7. The Federal Court of Appeal found at paragraph 18 of *Kisana v Canada (Minister of Citizenship and Immigration)* 2009 FCA 189 that the standard of review on H&C determinations is reasonableness.

[44] In *Vidakovic v Canada (Minister of Citizenship and Immigration)* 2011 FC 605, Justice Yvon Pinard held at paragraph 15 that the standard of review on the decision to issue a TRP is reasonableness. Justice Michel Shore found that a TRP decision is highly discretionary and was subject to the patent unreasonableness standard of review in *Farhat v Canada (Minister of Citizenship and Immigration)* 2006 FC 1275. The standard of review on the first two issues is reasonableness.

[45] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* 2011 SCC 62, the Supreme Court of Canada held at paragraph 14 that the adequacy of reasons is not a stand-alone basis for quashing a decision. Rather, "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." The third issue in this case, whether the Officer provided adequate reasons, is to be analyzed along with the reasonableness of the Decision as a whole.

[46] The fifth issue in this case touches on the Officer's application of a legal test to the evidence in front of him. This is a question of mixed fact and law, to which the applicable standard of review is reasonableness (see *Dunsmuir*, above, at paragraph 51).

[47] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[48] The Applicants raise several breaches of procedural fairness, including the Officer's decision not to interview them. The Federal Court of Appeal held in *Sketchley v Canada (Attorney General)* 2005 FCA 404 at paragraph 53 that the "procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty." Also, in *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)* 2003 SCC 29, the Supreme Court of Canada held at paragraph 100 that "It is for the courts, not the Minister, to provide the legal answer to procedural fairness questions." The standard of review in on the fourth issue is correctness.

[49] In *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369, [1976] SCJ No 118, Justice de Grandpré wrote at page 394 that the test for bias is that

> [...] the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that

> it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly?"

[50] Though Justice de Grandpré was in dissent, this formulation of the test was later approved by the Supreme Court of Canada in *R v RDS*, [1997] 3 SCR 484, [1997] SCJ No. 84. In that case, Justice Cory held at paragraph 114 that

> The onus of demonstrating bias lies with the person who is alleging its existence. [...] Further, whether a reasonable apprehension of bias arises will depend entirely on the facts of the case.

[51] Whether the Officer was biased is a question of fact within the jurisdiction of the reviewing court (see also *Martinez v Canada (Minister of Citizenship and Immigration)* 2005 FC 1065 at paragraph 5).

STATUTORY PROVISIONS

[52] The following provisions of the Act are applicable in this proceeding:

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11.** (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
[…]	[…]
24. (1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet	**24.** (1) Devient résident temporaire l'étranger, dont l'agent estime qu'il est interdit

the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.	de territoire ou ne se conforme pas à la présente loi, à qui il délivre, s'il estime que les circonstances le justifient, un permis de séjour temporaire — titre révocable en tout temps.
[…]	[…]
(3) In applying subsection (1), the officer shall act in accordance with any instructions that the Minister may make.	(3) L'agent est tenu de se conformer aux instructions que le ministre peut donner pour l'application du paragraphe (1).
[…]	[…]
25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.
[…]	[…]
42. A foreign national, other than a protected person, is inadmissible on grounds of an	**42.** Emportent, sauf pour le résident permanent ou une personne protégée, interdiction

inadmissible family member if	de territoire pour inadmissibilité familiale les faits suivants:
(*a*) their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible; or	*a*) l'interdiction de territoire frappant tout membre de sa famille qui l'accompagne ou qui, dans les cas réglementaires, ne l'accompagne pas;
(*b*) they are an accompanying family member of an inadmissible person.	*b*) accompagner, pour un membre de sa famille, un interdit de territoire.

[53] The following provision of the *Federal Courts Rules* SOR/98-106 (Rules) is applicable in this case:

56. Non-compliance with any of these Rules does not render a proceeding, a step in a proceeding or an order void, but instead constitutes an irregularity, which may be addressed under rules 58 to 60.	**56.** L'inobservation d'une disposition des présentes règles n'entache pas de nullité l'instance, une mesure prise dans l'instance ou l'ordonnance en cause. Elle constitue une irrégularité régie par les règles 58 à 60.

[54] The following provision of the *Federal Courts Immigration and Refugee Protection Rules* SOR/ 93-22 (Immigration Rules) is also applicable in this case:

22. No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.	**22.** Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, la demande d'autorisation, la demande de contrôle judiciaire ou l'appel introduit en application des présentes règles ne donnent pas lieu à des dépens.

ARGUMENTS

The Applicants

[55] The Applicants note that a TRP is a means by which people who are otherwise inadmissible can enter Canada. They acknowledge that applicants bear the onus of establishing why they should be granted a TRP and point out that H&C considerations are often raised in this type of application. They also note that CIC's Manual the TRP Guidelines instruct officers on how to exercise the discretion given to them under subsection 24(1) of the Act.

Officer Ignored H&C Guidelines

[56] The Applicants say the Officer ignored the H&C Guidelines when he made the H&C Decision before their Family Class Application was complete. At page 10, the H&C Guidelines say:

> If an H&C applicant also has a pending application for permanent residence in another category (e.g. live-in caregiver, spouse or common-law partner in Canada, protected person etc.), the application that was received first normally takes precedence although certain types of cases may have priority (e.g. spousal application). Multiple permanent resident applications should be consolidated. Processing of the H&C application should not begin until a decision is made on the first application.

[57] This shows the Officer should not have made the H&C Decision until the Family Class Application was complete.

Officer Ignored Evidence

[58] The Applicants also say the Officer did not examine evidence which was central to their claim. In the H&C Reasons, the Officer only recited facts gleaned from the documents they

submitted, without appreciating how these facts were important. They say the Refusal Letter does not mention the Social Worker Report or the Family Class Application. The Officer does not say why he rejected the findings set out in the Social Worker Report, which clearly describes the ties between them and their family in Canada. The Refusal Letter also does not mention the support the Applicants have from family and their religious community in Canada, the Female Applicant's inability to leave Canada, or the fact the Applicants are paying for the Female Applicant's care in Canada. The Officer ignored this same evidence when he considered the TRP Application.

[59] Following *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, the Applicants say the Court can infer that the Officer did not consider these pieces of evidence from his failure to mention them in either the H&C or TRP Decision. They also point to *Kaur v Canada (Minister of Citizenship and Immigration)* 2010 FC 805, where Justice Marie-Josée Bédard said the "immigration officer has discretion as to the weight to be given to the personal circumstances raised by an applicant, but he cannot fail to have regard to the applicant's personal circumstances."

Reasons Inadequate

[60] The Officer's H&C Reasons do not show why the factors they put forward were not sufficient to grant an H&C exemption in their case. The Memorandum does not show why he did not grant their TRP Application.

H&C Application

[61] The Applicants point to *Ventura v Canada (Minister of Citizenship and Immigration)* 2010 FC 871, where Justice Yves de Montigny had this to say at paragraphs 29 and 30

> I agree with the Respondent that the onus is on the Applicant to satisfy the officer that, in the Applicant's personal circumstances, the requirement to obtain a visa from outside Canada in the standard manner would cause unusual and undeserved or disproportionate hardship. That being said, once an applicant has put forward the positive factors militating in favour of granting his H&C application, the officer must explain why he does not find these factors sufficient to grant the application. An applicant is entitled to know why he failed to convince the officer of the cogency of his case, especially when there is so much at stake as his future in this country.
>
> In the case at bar, the officer did not meet this standard. He merely recited the allegations of the Applicant, only to dismiss them without any kind of explanation or analysis. Counsel for the Respondent countered that the Applicant, through his counsel, had not elaborated as to how and why the factors submitted would constitute undue hardship in the first place. I do not find this argument convincing. The implications of severing the Applicant's establishment in Canada, as evidenced by his family relations, his community involvement, his work and his studies are obvious without the necessity of stating how and why, from his point of view, his return to Angola would constitute undue hardship. On the basis of the record before him, the officer had more than sufficient evidence not only to determine whether unusual and undeserved or disproportionate hardship had been made out, but as importantly to give his reasons as to why he came to his conclusion.

[62] The Officer in the present case did not adequately explain his conclusions and engaged in speculation.

Officer did not Consider Hardship

[63] The Officer did not assess whether the hardship the Applicants would face if their H&C Application were denied was disproportionate in their circumstances. They note the H&C Guidelines set out unusual and undeserved or disproportionate hardship as an acceptable test for an H&C exemption. Hardship should be assessed globally by weighing all the H&C considerations applicants submit. The Applicants also note that, in *Hinzman v Canada (Minister of Citizenship and Immigration)* 2010 FCA 177, the Federal Court of Appeal held at paragraph 40 that officers assessing H&C applications have a duty to consider applicants' personal circumstances. However, the Officer did not examine the disproportionate hardship the Female Applicant would experience in her personal circumstances.

Establishment

[64] The Applicants note the H&C Guidelines instruct officers examining H&C applications to consider establishment in Canada as a factor in the H&C Application.

Medical Condition

[65] When the Officer was assessing was assessing the H&C Application, he did not appropriately treat the information about the Female Applicant. He did not say why he rejected their submission that an individualized assessment of their case meant non-medical evidence should be accepted. The Officer did not consider the Applicants' financial resources or the plan they submitted to pay for the Female Applicant's needs. The Officer only listed the documents they submitted and said "the new information does not modify the current assessment of medical inadmissibility." Even

though the Applicants provided submissions in response to the 27 April 2011 Fairness Letter, the Refusal Letter did not mention their plan to overcome the Female Applicant's medical inadmissibility. The H&C Reasons also do not show how the Officer considered the instructions on health inadmissibility in the H&C Guidelines.

Family Relationship

[66] The H&C Reasons do not show that the Officer adequately considered the relationship they have with their family in Canada. They note the H&C Guidelines direct officers to consider links to family members. Although the Social Worker Report indicated strong family ties in Canada and the hardship they would face if these ties were severed, the Officer only repeated the report's analysis of their family. The Officer ignored the recommendations in the Social Worker Report that the Applicants be allowed to stay in Canada and did not say how he applied the H&C Guidelines to this aspect of their case.

[67] The Applicants also say the Reasons do not adequately explain why the Officer did not grant them TRPs after denying the H&C Application. The H&C Guidelines say an officer may grant a TRP if an H&C Application is refused. However, it appears the Officer rejected their TRP Application because he also rejected the H&C Application, for which they provided strong evidence. The Applicants say the reasons for rejecting the TRP Application are identical to those for rejecting the H&C Application with the exception of the Memorandum. The Officer closed his mind to the possibility of granting a TRP, so the H&C Decision must be returned.

[68] In *Parmar v Canada (Minister of Citizenship and Immigration)* 2010 FC 723, Justice François Lemieux held at paragraph 49 that

> Without any analysis or comment the Visa Officer simply indicated that the applicant's Fairness response did not change her previously expressed view. The reasons were seriously deficient as they did not fulfill their functions of explaining why Mr. Parmar's submissions on the lack of need for social services were not accepted, providing public accountability and permitting effective judicial review. On the basis of these inadequate reasons, this Court simply does not know if the Medical Officer took into consideration the teachings in *Hilewitz* particularly on the need for an individualized assessment for Inderjot.

[69] The Applicants say the Reasons in this case do not meet the test Justice Lemieux articulated in *Parmar*, so both Decisions must be returned for reconsideration.

Improperly Assessment of Evidence in the TRP Application

[70] The Applicants also say the Officer did not assess the evidence they presented him in light of the TRP Guidelines. The TRP Guidelines tell officers they may issue a TRP if the need to enter or remain in Canada and the need to for presence in Canada outweighs the risks to Canadians or Canadian society. The Officer did not consider any of the factors listed in section 12.1 – *Needs Assessment* in the TRP Guidelines and also did not follow the instructions for assessing the risk to Canadian society at section 13.1 of the TRP Guidelines. Further, the Officer did not consider how the instructions to officers on medical inadmissibility cases, found at section 13.2 of the TRP Guidelines, impacted on the Female Applicant's case.

[71] Although the Officer gave reasons for refusing the Applicants' TRP Application, none of the reasons he gave fall into the categories the TRP Guidelines list in section 18 – *Procedure: When not to Issue a TRP*. This shows the TRP Decision is capricious and does not accord with subsection 24(3) of the Act, which directs officers to exercise their discretion in accord with any instructions from the Minister.

[72] Although the Female Applicant was medically inadmissible, this was not an obstacle to granting the Male Applicant a TRP. Further, the Officer's finding that the Male Applicant's medical admissibility might change for the worse was speculative, so the TRP Decision should be returned.

Other Factors and Evidence

[73] The Applicants also say the Officer did not consider the additional evidence they submitted which showed they were able to overcome the Female Applicant's medical inadmissibility and should be granted a TRP. They provided the Officer with information that showed they have the resources to pay for the Female Applicant's care, but neither the Refusal Letter nor the Memorandum mention this evidence. The Officer's only statement on this aspect of their TRP Application is his conclusion that "the new information does not modify the current assessment of medical inadmissibility." The Officer does not explain why the evidence they submitted does not overcome the medical inadmissibility, which shows he did not consider it.

Officer Breached Procedural Fairness

[74] The Applicants also say the Officer breached their right to procedural fairness because he was biased. They refer to the test for bias in *Committee for Justice and Liberty*, above, and say a reasonable and informed person would perceive bias in the Officer's conduct. The Officer made unfair statements which show he did not approach the facts, evidence, and submissions with an open mind. He wrote in a critical and harsh tone typical of matters dealing with misrepresentation or criminal convictions which was inappropriate in this case. The Applicants say the Officer committed the same error Justice L'Heureux-Dubé cautioned against in *Baker*, above, when the officer's "frustration with the "system" interfered with his duty to consider impartially whether

the appellant's admission should be facilitated owing to humanitarian or compassionate considerations." See paragraph 48.

[75] The Applicants also say the Officer engaged in speculation when he said he was not convinced the Male Applicant would remain willing and able to follow through on his commitment.

Failure to Conduct an Interview

[76] The Applicants note the Officer found they were not credible or trustworthy and say he was obligated to call them for an interview to address any credibility concerns. He did not, so he breached their right to procedural fairness.

Costs

[77] The Applicants ask for costs in this application, because the Officer was biased against them. They note the Respondent has not given them notice he intends to enforce the removal orders against them and point out that the TRP Guidelines say a TRP may be issued where enforcement of a removal order is not possible.

The Respondent

[78] The Respondent notes that H&C Relief under subsection 25(1) of the Act provides exceptional relief from the ordinary requirement to obtain a visa before coming to Canada. TRPs are also an exceptional measure; applicants must satisfy officers reviewing their applications they will leave Canada upon the expiry of their status. The Respondent also notes that Quevillon found the

Female Applicant medically inadmissible. The Applicants have a history of non-compliance with Canada's immigration laws and their actions show they are not trustworthy.

Guidelines Not Binding

[79] CIC's Guidelines are not binding on Officers and are only instructions which are designed to encourage consistency in decision making. Subsection 25(1) confers a large amount of discretion on officers to grant or not grant requests for H&C relief.

H&C Process

[80] The H&C Guidelines instruct officers on how to proceed in H&C applications where an applicant is found medically inadmissible, as the Female Applicant was in this case. Officers can refuse an H&C application for medical inadmissibility, but they can also grant the application. When considering an H&C exemption in the face of a medical inadmissibility, the H&C Guidelines instruct officers to consider the cost of care, alternate arrangements which have been made, the likelihood the applicant will be self-supporting, and the severity of the applicant's anticipated need for health or social services. *Hilewitz v Canada (Minister of Citizenship and Immigration)* 2005 SCC 57 establishes that officers must consider applicants' willingness and ability to mitigate any excessive demand on social services. The Officer considered these factors, so the H&C Decision should stand.

TRP Guidelines

[81] The TRP Guidelines give direction to officers on how to exercise their discretion and to encourage consistency in decision making. Subsection 24(3) of the Act does not give the TRP

Guidelines the force of law because they are not instructions within the meaning of that section.

Section 1 of the TRP Guidelines provides as follows:

> This chapter provides policy and procedural guidelines to Citizenship and Immigration Canada (CIC) staff at inland offices on:
>
> i. issuing temporary resident permits to allow inadmissible persons to enter or remain in Canada;
> ii. extension, expiry and cancellation of permits;
> iii. granting of permanent resident status to permit holders.

[82] Instructions within the meaning of subsection 24(3) are appended to the TRP Guidelines and are clearly issued personally by the Minister. The TRP Guidelines, though useful to assist officers and the Court, are not binding on the Minister or his delegates.

Two Decisions Separate

[83] The Respondent says the Officer made the Decision on the TRP Application independent of his determination of the H&C Application. Although the Refusal Letter addresses both decisions, they were made separately. The reasons in each decision under review are separate except to the extent the Memorandum refers to pages 8 and 9 of the H&C Decision.

No Premature H&C Decision

[84] It was reasonable for the Officer to make the H&C Decision before their Family Class Application was completed. Although the H&C Guidelines say Officers should not process H&C Applications until other pending sponsorship applications are complete, the Respondent says the only outstanding application is Janice's sponsorship application; the Applicants have not actually applied for permanent residence.

[85] The Respondent also notes that the H&C Guidelines are not legally binding, so it was not a reviewable error for the Officer to make the H&C Decision when he did. Leaving an H&C application to be processed until after other applications may not be practical in every case. Further, the Applicants were not prejudiced when the Officer processed their H&C Application before the Family Class Application was complete.

Factors and Evidence Weighed Appropriately

H&C Application

[86] The Officer provided sufficient reasons to show he weighed all the factors and evidence the Applicants put forward to support their H&C Application. The H&C Guidelines set out factors to be considered in processing an H&C application, but these are only indicators of what constitutes a reasonable interpretation of the power conferred by subsection 25(1) (see *Baker*, above, at paragraphs 16 and 17). Although the Applicants have said he did not, the Officer acknowledged the pending Family Class Application, but nothing turned on this evidence.

Social Worker Report

[87] The H&C Reasons show the Officer considered the Social Worker Report. He was not bound to accept its conclusions. Immigration officers have substantial leeway to decide which considerations are relevant in any given H&C application and their discretion includes the right to assign more or less weight to various factors.

Family Ties

[88] In this case, the Officer considered the support available to the Applicants in Canada and in the USA. Although the Applicants said their children in the USA were unable to care for them, the Officer found they provided insufficient evidence to prove this was the case. Contrary to the Applicants' assertions, the CBSA officer's notes from their first attempt to enter Canada showed their sons in California are a banker and an electrical contractor, both of whom said the Applicants could live with them. Further, the Social Worker Report indicated the sons had loving relationships with their parents, even though they were not able to care for them daily.

[89] Even though the Applicants preferred to stay close to Janice in Edmonton, they provided insufficient reasons why they could not live in the USA. Their documentation showed they were supporting themselves financially, so the sons' financial support was not important. They are also not living with Janice and have sold their home in California, so the distance from their sons was not important.

Female Applicant's Condition

[90] The Officer also adequately considered the impact of the Female Applicant's medical condition on the H&C Application. The Applicants have not shown why the fact the Female Applicant was in private care should have resulted in a positive H&C determination. The Male Applicant decided to move the Female Applicant into a care home in Canada even though they did not have status here. It was clearly relevant for the Officer to consider that the Applicants' circumstances in Canada were of their own making. The Applicants have also not demonstrated that health care in the USA would be inadequate, even though it may be more expensive. *Bichari v*

Canada (Minister of Citizenship and Immigration) 2010 FC 127 establishes that the standard for H&C relief is not whether better or more affordable treatment is available in Canada.

[91] It was also reasonable for the Officer to find he was not satisfied the Applicants would follow through on their commitment to pay for the Female Applicant's care in Canada. The plan they submitted lacked detail which was a reasonable basis for the Officer's conclusion. The Applicants also did not provide sufficient medical evidence to show the Female Applicant could not be removed to the USA.

Male Applicant's Spiritual Support

[92] The Officer also considered the impact of the Male Applicant's Plymouth Brethren community on the H&C Application. It was reasonable for the Officer to put little weight on this factor, as the Male Applicant had apparently been a member of the Plymouth Brethren while he was in the USA. He had not shown why it was necessary for him to be with the community in Canada.

[93] The Applicants' complaints about the factors the Officer considered amounts only to a disagreement with how he weighed the evidence. The Applicants have not established the Officer did not consider any relevant factor and it is not proper for the Court on judicial review to re-examine the weight the Officer gave to those factors.

TRP Application

[94] The Respondent notes that a TRP application is not a full H&C Application, which means the Officer was not obligated to deal with every submission the Applicants made. The Officer considered all the relevant evidence.

[95] Although the Applicants have said otherwise, the Officer did not ignore the Female Applicant's medical condition or the plan they submitted to pay for her care when he considered the TRP Application. The Officer thoroughly addressed these matters in the H&C Decision and there was no reason to go into the same detail on the TRP Application. The Memorandum referred to the Officer's analysis of these issues in the H&C Decision, which makes it clear the Officer considered all the relevant factors and evidence. Given the way they entered Canada, the Officer was not satisfied the Applicants would remain willing or able to carry out their commitment to pay for the Female Applicant's care.

[96] It makes no sense for the Applicants to now say the Officer should have granted the Male Applicant a TRP even if the Female Applicant was medically inadmissible. This was a joint application and there was no reason for the Officer to consider whether the Male Applicant would leave his wife of 60 years to stay in Canada without her. Section 42 of the Act also makes it clear that, since the Female Applicant is medically inadmissible, this makes the Male Applicant also inadmissible.

Other Factors in the H&C Application

[97] The Respondent also says the Officer reasonably considered other factors in the H&C Application which the Applicants have not addressed in their submissions.

Lack of Clean Hands

[98] It was reasonable for the Officer to consider the manner in which the Applicants came to Canada. In their submissions on their H&C Application, they said the delays in processing the

Family Class Application put them "in a situation in which [they] had to make a decision about how [Janice] would care for her parents." It was not speculative for the Officer to conclude the Female Applicant's medical condition led them to come to Canada, given that they came to Canada without authorization and knowing the Female Applicant had Alzheimer's disease.

[99] The Respondent points to *Legault v Canada (Minister of Citizenship and Immigration)* 2002 FCA 125 for the proposition that those who come to Canada to settle must be of good faith and comply with the requirements of the Act. The Applicants' attempts to circumvent the requirements of the Act were relevant to the H&C Decision, so it was not an error for the Officer to consider them.

Establishment in the Applicants' Control

[100] The Respondent points to *Tartchinska v Canada (Minister of Citizenship and Immigration),* [2000] FCJ No 373. He says where H&C applicants remain in Canada without status in the absence of circumstances beyond their control they should not be rewarded for accumulating time in Canada.

No Evidence of Hardship

[101] In this case, the Officer clearly took into account the Applicants' personal circumstances and found there was no evidence of hardship. It was not an error for the Officer not to analyse hardship when they did not adduce any evidence of hardship. Because there was no evidence of hardship, it was reasonable for the Officer to conclude the H&C factors the Applicants put forward were

outweighed by the Female Applicant's medical inadmissibility and the fact they were subject to removal orders.

No Breach of Procedural Fairness

[102] The Respondent agrees with the Applicants that the proper test for bias is that set out in *Committee for Justice and Liberty*, above, but says the test for bias is not met in this case. Although the Applicants take issue with the tone of the Officer's comments, the Reasons contain fair comments and conclusions based on the evidence. The Reasons show a reasonable, dispassionate evaluation of the circumstances based on the evidence and without inflammatory language or hyperbole. The Officer's comments here are nothing like the impugned comments in *Baker*, above. The Applicant's disagreement with the Officer's conclusions does not show bias.

[103] The Respondent relies on *Ali v Canada (Minister of Citizenship and Immigration)* 2008 FC 784, where Justice Michael Phelan held "A TRP is an exceptional remedy and there is nothing in the process which, of itself, would raise the issue of a right of interview to the level of procedural fairness" (see paragraph 17). There was no requirement for the Officer to hold an interview, so he did not breach the Applicants' right to procedural fairness when he did not.

No Grounds for Costs

[104] An award of costs is inappropriate in this case because the Applicants did not seek costs in their application for leave or the relief portion of their Memorandum of Argument. This alone is sufficient to dismiss their request for costs in the submissions portion of their Memorandum of Argument, but there are also no special reasons for granting costs in this case. The Respondent

points to section 22 of the Rules and says the Applicants have not shown special reasons in this case. Even if the Officer erred, this is not enough to justify a cost award in the face of the policy against awarding costs in immigration matters.

The Applicants' Reply

[105] The Applicants say the Court has overturned H&C decision where officers failed to appropriately apply the H&C Guidelines. They point to *Chen v Canada (Minister of Citizenship and Immigration)*, [2003] FCJ No 630, *Beluli v Canada (Minister of Citizenship and Immigration)*, [2005] FCJ No 1112, *Kaur*, above, and *Kargbo v Canada (Minister of Citizenship and Immigration)*, [2011] FCJ No 577. They note that, in *Kaur*, above, Justice Bédard held that an officer may weigh an applicant's circumstances but may not disregard them.

[106] Although the Respondent has said the Applicants did not submit a permanent residence application, they say the Family Class Application included their forms. It was only a matter of time before CIC would begin processing the Family Class Application.

[107] The Applicants also say the inflammatory tone of the Officer's reasons carries over into the affidavit he has submitted to the Court. His affidavit also contains argument which should be given no weight.

Costs

[108] Although they did not include a request for costs in their leave application, the Applicants say this was because they had not yet received the Reasons. They were unaware of the language the Officer used in the Reasons, so they had no basis to request costs at that time. Further, they rely on

section 56 of the Rules to meet the Respondent's argument they should be denied costs for not asking for costs in the 'relief sought' portion of their Memorandum of Argument.

The Respondent's Further Memorandum

[109] The Respondent says the Applicants deliberately entered Canada in contravention of the Act and Regulations. Given their immigration history, it was reasonable for the Officer to conclude they had not entered Canada for a temporary purpose and to deny their TRP Application accordingly. They have not shown the H&C Decision was unreasonable, that any of the reasons the Officer gave are inadequate, or the Officer was biased, so both decisions should stand.

Reasons Sufficient

[110] The Respondent says the Reasons were sufficient and, if they were not, the Applicants were obligated to request additional information and clarification. He points to *Hayama v Canada (Minister of Citizenship and Immigration)* 2003 FC 1305, at paragraph 15, where Justice Edmond Blanchard said

> If the applicant was unsatisfied with the decision letter and felt it did not adequately explain the decision, a request should have been made for further elucidation. There is no evidence that such a request would have been refused. I therefore conclude that, in the circumstances of this case, there is no breach of duty of fairness due to an absence of reasons, or inadequacy of reasons.

[111] Although the Applicants have argued the H&C Reasons do not show how the Officer considered the H&C Guidelines related to health inadmissibility, the Respondent says Quevillon acknowledged the Applicants presently had funds to pay for the Female Applicant's care. However, the Officer found this was not sufficient; he denied the H&C Application because he was not

satisfied they would continue to pay for the care the Female Applicant required. He also found their ability to pay for her care was undermined by their immigration history and lack of credibility. Further, the Female Applicant's medical inadmissibility was only relevant in that it showed the Applicants' motivation for avoiding ordinary immigration channels.

[112] In addition, the Respondent notes the Officer said medical inadmissibility was not necessary to refuse the H&C Application because the Applicants were already inadmissible under subsection 44(1) of the Act. The Female Applicant's medical inadmissibility was only one of several factors the Officer considered. *Parmar*, above, says reasons must explain the decision to the parties, provide public accountability, and permit effective review. The H&C Reasons in this case meet this test.

[113] Although the reasons the Officer gave for refusing the TRP Application are concise, they are clear. The Officer found no reason for the Applicants to remain in Canada. They are inadmissible for a previous overstay, they are subject to a removal order, and there is no likelihood they will be granted permanent residence in the near future. The Female Applicant is medically inadmissible and it is possible the Male Applicant is medically inadmissible as well. The handwritten note on the Memorandum summarizes these concerns. The Respondent notes that the TRP Decision was informed in part by the Officer's H&C Decision; his reasons for that decision were adequate, so his reasons on the TRP Application are also adequate.

[114] The adequacy of reasons depends on the circumstances of each case. So long as the reasons show the decision-maker considered all the relevant factors, they will be sufficient (see *Shahid v Canada (Minister of Citizenship and Immigration)* 2004 FC 1607 at paragraph 15). It is clear from his reasons that the Officer considered all the relevant factors in this case.

TRP Refusal Reasonable

[115] A TRP is premised on an applicant's intention to stay in Canada for a temporary purpose. The Officer was not satisfied the Applicants had such a purpose, so it was reasonable for him to deny their TRP Application. Prior non-compliance with immigration laws is a proper basis on which to conclude an applicant for a TRP will not leave on the expiration of the TRP. Although the Officer did not explicitly consider the factors set out in the TRP Guidelines, the guidelines are not binding and cannot fetter the Officer's discretion.

[116] The Officer's Decision to refuse the Applicant's TRP Application was reasonable because they did not have a temporary purpose to be in Canada. Given the Officer's refusal of their H&C Application and their history of disregard for Canada's immigration laws, there was no reason for him to grant their application. Further, their prior non-compliance was an appropriate basis for him to conclude they would overstay any TRP they were granted. The Officer also considered the Applicants' ability to leave Canada and how this would be affected by a prolonged stay in Canada.

ANALYSIS

[117] I heard IMM-5788-11 and IMM-5790-11 together. These Reasons and my decision should be placed on both files.

[118] Gordon and Muriel Rosenberry are old and sick and, at this stage in their lives, deserve respect and sympathy. Fortunately for them, as age and illness began to darken their days, they came to Canada where, as the record shows, they have been afforded every advantage and dignity our immigration system has to offer. The officers who have dealt with them have acted with

exemplary compassion and professionalism, but those same officers are charged with the duty of enforcing Canadian law and maintaining the integrity of our immigration system. Because they have done their duty, the Applicants are now accusing them of bias and are even asking that their costs be paid. This is an unfortunate approach for the Applicants to take before this Court, and it is one which reflects badly upon them.

[119] The truth of the matter is that the Applicants have no right to be in Canada. They knew this before they came and they know it now. They simply decided, knowing that Muriel was very sick with Alzheimer's, that they would jump the queue and come and live in Edmonton. Muriel cannot be faulted because of her illness, but Gordon and his daughter, Janice, appear to have known exactly what the situation was and to have decided to act in disregard of Canadian law. Nor have they been entirely forthright with immigration authorities.

[120] Although Gordon and Muriel are old and sick, they are far from destitute. They can both afford the medical care they need and there is nothing to suggest it would not be available to them in the USA at a price they can afford. They have simply decided that they like Canada's health care system better and that there is likely a monetary advantage to their being here.

[121] The Applicants are fortunate in having a loving daughter in Janice, who lives close by in Edmonton. But they also have two loving sons in the USA. Those sons are no doubt busy people, but there is no basis for saying that they could not be close by to render the family support that Muriel and Gordon need at this stage in their lives. Muriel will be in full-time care and there is nothing to suggest that Gordon cannot live independently with his sons close by in the same way that he does with Janice in Edmonton.

[122] The Applicants attack the H&C Decision for a variety of reasons. They say it is premature and was made without regard for the evidence, that there is no analysis of H&C factors, that hardship is not assessed, that establishment is not taken into account, that the medical situation is not assessed, that there is no analysis of the family situation, and that the tone the decisions reveals bias. A simple reading of the decisions reveals that these grounds are entirely spurious.

[123] The same applies to the grounds raised by the Applicants with regard to the TRP Decision. The H&C reasons apply to that application, but there are additional reasons in the notes which show that the TRP was refused for a variety of reasons, including medical inadmissibility, the existence of valid exclusion orders, and the fact that the Applicants have acted, and continue to act, illegally and in breach of Canada's immigration laws. The Applicants have no intention of leaving Canada at any time and, even though these applications before me cannot succeed, the benign nature of our system has allowed them a considerable amount of additional time here.

[124] I have reviewed carefully all of the grounds advanced for reviewable error on both applications. There is no sign of procedural unfairness or unreasonableness. The Officer was fully alive to the whole situation and, while recognizing the vulnerability of the Applicants, carried out his duty and applied the law accurately and fairly.

[125] Of course, the Court wishes Gordon and Muriel and their family well. Dealing with aging and declining parents is always difficult, but it does not help to flaunt the immigration system and attack officers who are simply doing their job. I also have a concern about basic honesty. There is evidence in the TRP application made to the Officer that the Applicants represented that the family somehow did not know about Muriel's Alzheimer's before she came to Canada. Even before me, legal counsel was not accurate on this point. The evidence is very clear, however, that Muriel was

diagnosed with the disease long before she came to Canada. At the 2009 Interview, Gordon told CIC that she had been diagnosed in 2005. It is easy to see, then, why the Officer would doubt the Applicants' honesty. I realize that the horrible illnesses of loved-ones can give rise to desperate acts, but the Rosenberry family, on the evidence before me, appears to be better positioned than many others who have to face the challenges of old age.

[126] Counsel agree there is no question for certification on either application and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

3. These Reasons for Judgment and Judgment will be placed on files IMM-5788-11 and IMM-5790-11.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-5788-11 and IMM-5790-11
STYLE OF CAUSE:	**GORDON ROSENBERRY; MURIEL ROSENBERRY** - and - **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 29, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	May 3, 2012

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