Federal Court Cour fédérale

**Date: 20140331**

**Dockets: IMM-12382-12**
**IMM-12380-12**

**Citation: 2014 FC 303**

**Ottawa, Ontario, March 31, 2014**

**PRESENT: The Honourable Madam Justice Tremblay-Lamer**

**Docket: IMM-12382-12**

**BETWEEN:**

**KAIRUN NAZLIYA SHABDEEN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**Docket: IMM-12380-12**

**AND BETWEEN:**

**MOHAMED HUSSAIN SHABDEEN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] These are two applications for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) of decisions of a Visa Officer dated October 12, 2012 refusing the applicants' applications for a temporary resident permit (TRP) pursuant to section 24 of the Act. These applications were heard together. A copy of this Judgment shall be placed on each Court file (IMM-12382-12 and IMM-123802-12).

### FACTS

[2] The applicants are married and both citizens of Sri Lanka. They entered Canada in 1992 and made asylum claims, which were subsequently rejected. They were ordered to leave Canada by February 1, 1998, which they did.

[3] The applicants' daughter was born on January 22, 1996 while her parents were residing in Canada, therefore she holds Canadian citizenship.

[4] The applicants travelled to the United States in February 1998 where they filed an asylum request, which was also denied. They were arrested on July 17, 2001 and, along with their daughter, ordered removed from the United States on March 24, 2004. However, their removal had been postponed since they did not possess Sri Lankan passports. They now have valid passports and were ordered to report to Immigration and Customs Enforcement on September 26, 2012.

[5] The applicants' daughter suffers from autistic disorder and moderate mental retardation. She has received both inpatient and outpatient care in New Jersey, where she has been identified as exhibiting the following problematic behaviour: aggression; agitation; and poor impulse control.

[6] The applicants claim that the quality of care and support that their daughter requires will not be available to her in Sri Lanka therefore have decided to return her to Canada. They state that several assessments were required for their daughter that necessitated her parents' presence. These assessments were anticipated to take one to two months.

[7] The applicants' daughter has been enrolled in a special education program at school since October 2001 and has an Individualized Education Program

**THE DECISION UNDER REVIEW**

[8] The Officer rejected the applicants' TRP applications stating that he was "not satisfied there is sufficient evidence your need to enter Canada is compelling enough to warrant issuing a temporary resident permit".

[9] In assessing the need factor of the TRP analysis, the Officer found that while the applicants' then 16 year-old daughter requires the support of her parents, her need for additional services such as those that might be available in Canada was not established by the evidence submitted. The Officer noted that while the letters submitted refer to assessments, they do not refer to any established requirements for treatment or other services. The Officer found that there was a lack of information about the projected needs of the applicants' daughter. He concluded that "[i]n the

absence of an indication of what treatment is necessary, as well as the availability and cost of the treatment, it is difficult to establish exactly what the degree of need is in this case."

[10] As to the risk factor of the TRP analysis, the Officer was not satisfied that there was sufficient evidence that the risk of allowing the applicants to enter Canada is minimal. Considering the applicants' attempts to remain either in Canada or the United States and the length of time they have been away from Sri Lanka, the Officer found that there is a considerable risk that they will remain in Canada permanently.

[11] The Officer was also not satisfied that there was sufficient evidence of a negligible risk the applicants will be unable or unwilling to support themselves or those dependent on them, given that the evidence shows their assets totalling $1,425.79 and there was little evidence detailing arrangements for their care and support in Canada other than the single letter from the Muslim Welfare Centre.

[12] Finally, the Officer dismissed the applicants' representative's request for a consideration of humanitarian and compassionate grounds taking into account the best interests of the child directly affected given that this was not an application pursuant to section 25(1) of the Act.

**ISSUES**

1. Was the Officer's analysis of the applicants' need to enter Canada reasonable?
2. Was the Officer's analysis of the applicants' risk to Canadian society reasonable?

**STANDARD OF REVIEW**

[13] The issuing of a TRP is a highly discretionary decision, thus attracting a high degree of deference. The standard of review for an Officer's decision under section 24 of the Act is that of reasonableness (*Ali v Canada (Minister of Citizenship and Immigration)*, 2008 FC 784 at para 9; *Alvarez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 667 at para 18).

**ARGUMENTS AND ANALYSIS**

***1. Was the Officer's analysis of the applicants' need to enter Canada reasonable?***

[14] As a preliminary matter, the applicants submit that subsection 24(3) of the Act, which states that "in applying subsection (1), the officer shall act in accordance with any instructions that the Minister may make" applies to the CIC Overseas Processing Manual OP-20 (the Manual) and therefore grants the Manual the force of law (*Huang v Canada*, 2010 FC 1217, at para 11 [*Huang*]). The Officer must therefore consider the factors enumerated in section 8 of the Manual.

[15] The respondent argues that departmental guidelines are not Ministerial instructions having the force of law, and that the Manual is not binding (*Farhat v Canada (Minister of Citizenship and Immigration*), 2006 FC 1275 at paras 28-29 [*Farhat*]). I agree.

[16] The decision in *Huang* interpreting section 24(3) of the Act to mean that the Manual should be given the force of law is not in line with the jurisprudence that has consistently held that governmental guidelines such as Citizenship and Immigration Manuals are not binding on either the government or on courts (*Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126

at para 15; *Farhat* at paras 28-29). I note for example, that in the year following *Huang*, Justice Near, in the context of a TRP application pursuant to section 24 of the Act reasserted that "it has been repeatedly held that guidelines such as the Manual are not law, are not binding on the Minister or his agents, and do not create any legal entitlement" (*Alvarez v Canada (Minister of Citizenship and Immigration*, 2011 FC 667 at para 35).

[17] Nonetheless, whether or not the Manual is binding, it appears from the Officer's reasons that he weighed the applicants' need to enter Canada with the risks to Canadian society, as required by section 5.8 of the Manual. Moreover, he considered the factor of family ties in his assessment of need, noting that the applicants' daughter requires the support of her parents.

[18] The applicants submit that the Officer erred in his needs analysis in three ways:

i. misapprehension of "need" to enter Canada;

ii. unreasonable expectations of letters from autism organisations; and

iii. lack of medical training to examine and assess what is reasonable of medical organisations.

[19] The applicants argue that the Officer mistakenly focused on the services and programs available to their daughter in Canada when this is not relevant, as she is a Canadian citizen and therefore has a right to the healthcare afforded all citizens. Instead, the Officer should have focused on the need of the applicants to enter Canada, which is to facilitate and assist with the assessments to be undertaken and to provide the requisite consent. The importance of the applicants accompanying their daughter to Canada was well documented in the letters from the autism organisations. As they are not medically inadmissible, any assessment edging towards excessive

demand and the quality of a “care plan” (as for an inadmissible family member under section 38 of the Act) is inappropriate and suggests a misapprehension of the assessment required for the TRP application that is the subject of this application.

[20] The applicants further submit that it was unreasonable for the Officer to substitute his opinion as to what is reasonable for the course of action set forth by professional organisations. The Officer simply lacks the expertise to make such a pronouncement as he “is not a medical expert” (*Adewusi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 75 at para 7). Both the letters from the organisations stating that the applicants’ presence was “required” and “vital” for the process, as well as documentation from the United States outlining the daughter’s behavioural and communication difficulties make clear why her parents would be of value in the assessments undertaken.

[21] The respondent submits that the onus was on the applicants to provide all evidence in support of their application. The applicants’ failure to present sufficient evidence of their need to attend to matters involving their daughter is omitted at their peril, (*Owusu v Canada (Minister of Citizenship and Immigration),* 2004 FCA 38). They failed to show that the arrangements they intended to make for their daughter in Canada would reasonably transpire and were reasonably within their means. Without further details about the daughter’s projected care as detailed in the Officer’s decision, it was reasonably open to the Officer to conclude that, although the applicants may have wanted to come to Canada to assist their daughter, there may not have been any compelling need for such a visit as it had not been established that there were in fact any services which were available to this family.

[22] I agree with the applicants that the focus of the Officer's reasoning was wrong. The applicants submitted their application for a TRP on the basis of a compelling need to be present in Canada in order to facilitate and assist in their daughter's assessments and provide their requisite consent. They submitted documentary evidence supporting their application in the form of letters from healthcare providers attesting that the applicants' presence was required in order to complete the necessary interviews. There were no issues raised in the decision as to the credibility of these letters or challenging the proposition that the parents need to be present in order to complete the assessments given that their daughter cannot articulate and communicate her needs and desires. The documentation from the United States underscores the extent of her disability and clearly establishes that she would not able to travel by herself or to complete her assessment and transition to Canada without the help of her parents. As the applicants' daughter is a Canadian citizen, and there are no issues raised in terms of medical inadmissibility, it was unreasonable of the Officer to focus his assessment of the applicants' need to enter Canada on the details of the course of treatment that their daughter would receive in Canada.

[23] An evaluation of whether the applicants have a compelling need to enter Canada is at the heart of a TRP analysis. As Justice Shore set out in *Farhat* at paragraph 22:

> The objective of section 24 of IRPA is to soften the sometimes harsh consequences of the strict application of IRPA which surfaces in cases where there may be "compelling reasons" to allow a foreign national to enter or remain in Canada despite inadmissibility or non-compliance with IRPA.

[24] Given the errors committed in the Officer's analysis of the need of the applicants to enter Canada, I find that the decision is unreasonable.

[25] For this reason and this reason alone, the judicial review is granted in both applications.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**:

These applications for judicial review are allowed. The matters are remitted back to a differently constituted panel for redetermination.

"Danièle Tremblay-Lamer"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKETS:** IMM-12382-12 AND IMM-12380-12

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| **DOCKET:** | IMM-12382-12 |
| **STYLE OF CAUSE:** | KAIRUN NAZLIYA SHABDEEN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **AND DOCKET:** | IMM-12380-12 |
| **STYLE OF CAUSE:** | MOHAMED HUSSAIN SHABDEEN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |

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| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | MARCH 26, 2014 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | TREMBLAY-LAMER J. |
| **DATED:** | MARCH 31, 2014 |

**APPEARANCES:**

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| Mario Bellissimo | FOR THE APPLICANTS |
| Sally Thomas | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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