Federal Court  Cour fédérale

**Date: 20151221**

**Docket: IMM-784-15**

**Citation: 2015 FC 1406**

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

**Ottawa, Ontario, December 21, 2015**

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

**BETWEEN:**

**ROLA EL DOR**

**Applicant**

**And**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] The applicant, Rola El Dor, is a Lebanese citizen. She submitted an application for a permanent resident visa in the "Quebec-selected skill worker" class to settle in Canada with her husband and two minor children, Rayan and Jad. In October 2013 as part of Ms. El Dor's

application review, Jad, who is suffering from autism spectrum disorder, underwent a cognitive assessment by a physician designated by the Minister of Citizenship and Immigration. The evaluating physician tested the child, who scored 11/30, which is a moderate-to-severe cognitive impairment score. These findings were included in the examining physician's June 2014 report.

[2] In a fairness letter dated July 4, 2014, Canadian authorities advised Ms. El Dor of their findings regarding Jad's condition, i.e. a diagnosis of pervasive personality disorder and autism spectrum disorder. The letter informed Ms. El Dor that in Canada, Jad would have to be treated by a multidisciplinary medical team, at an estimated annual cost of $43,068. Jad might therefore reasonably be expected to cause excessive demand on social services in Canada. In response to the fairness letter, Ms. El Dor said she sent Canadian authorities a letter to which were attached Jad's report cards, a report from Jad's attending physician in Lebanon challenging the medical assessment, and a detailed life plan for managing Jad's medical needs.

[3] In November 2014, a visa officer from the Canadian embassy in Romania [the officer] denied Ms. El Dor's visa application on the grounds that her son, Jad, would cause excessive demand on health and social services in Canada under the terms of subsection 38(1) of the *Immigration and Refugee Protection Act* , S.C. 2001, c 27 [IRPA].

[4] Ms. El Dor is now calling for a judicial review of the officer's decision to deny her application. She argued that in rendering his decision, the officer ignored the evidence submitted by Ms. El Dor and failed to comply with the rules of procedural fairness. She also maintained that the examining physician hired by the Minister erred in his assessment of the evidence and

Jad's condition, and that her mitigation plan was not correctly reviewed. She asked the Court to set aside the officer's decision and refer the matter back to the Minister for reconsideration in light of all the evidence submitted.

[5] The following issues are in dispute:

- Did the officer's decision ignore the evidence and breach the rules of procedural fairness?
- Should the decision be set aside because the Certified Tribunal Record [CTR] was incomplete?
- Did the examining physician err in ignoring part of the evidence submitted and performing a generic assessment of Jad's condition?
- Did the decision-makers err in performing an individualized assessment of the mitigation plan submitted by Ms. El Dor and providing reasons for its rejection?
- Did the officer breach the standards of procedural fairness by failing to send a second fairness letter?

[6] For the reasons presented below, Ms. El Dor's application for judicial review must fail because the Court finds that the officer did not bend the rules of procedural fairness; the examining physician considered all the evidence and Jad's particular condition; and the officer's decision to deny the application on health grounds is within a range of possible, acceptable outcomes in the circumstances.

## II. Background

### A. *The facts*

[7] Subsequent to the submittal of Ms. El Dor's application for a permanent resident visa, an assessment of her young son Jad's cognitive state indicated a diagnosis of pervasive personality disorder, autism spectrum disorder and moderate-to-severe cognitive impairment. The examining physician hired by the Minister, Dr. Patrick Thériault, provided a medical opinion to this effect in June 2014. In the fairness letter sent by the officer in July 2014, Canadian authorities advised Ms. El Dor of Jad's condition, and informed her that Jad would have to be treated by a multidisciplinary team of medical specialists. Because Jad's annual health care costs were estimated at $43,063, Jad might reasonably be expected to cause excessive demand on health services in Canada.

[8] The fairness letter asked Ms. El Dor to provide additional information on Jad's health problems and the social services he would require in Canada, as well as a personal plan and a declaration of ability and intent to mitigate the demand on social services.

[9] Ms. El Dor said she responded to the fairness letter by providing the visa section of the Canadian embassy in Bucharest with several documents in a letter dated October 6, 2014 sent by her counsel in Lebanon, Ms. Chelhot. Ms. Chelhot's letter referred, in particular, to a letter dated September 26, 2013 from Dr. Joseph Dib, Jad's attending physician in Lebanon, Jad's 2012–2014 report cards, and a declaration of ability and intent from Ms. El Dor confirming that every effort would be made to ensure that Jad would not cause excessive demand on Canadian health

or social services. The October 6, 2014 letter also contained a detailed life plan for the family, as well as proof of assets. In an affidavit submitted in this case, Ms. El Dor attested that she personally sent the letter to the express courier company's office. Also, Ms. El Dor said she personally gave Dr. Dib's letter to the designated physician for the second time when Jad underwent a medical assessment apparently performed September 28, 2014.

[10] The Minister acknowledged receipt of Ms. Chelhot's letter dated October 6, 2014, but the Certified Tribunal Record does not contain any medical opinion provided by Dr. Dib dated September 2013. Rather, it contains a medical assessment signed by a Lebanese neurologist, Dr. Mohamad El Bitar, dated September 23, 2014. On November 12, 2014, Dr. Thériault, after having considered the additional information provided by Ms. El Dor, indicated that his June 2014 medical opinion must be upheld and that the mitigation plan submitted by Ms. El Dor was not reasonable.

[11] On November 20, 2014, the officer therefore rejected Ms. El Dor's visa application. On July 7, 2015, Dr. Thériault signed an affidavit stating that Dr. Dib's letter was not included in the documents sent by Ms. Chelhot in October 2014, which he received in November 2014. As a result, he did not consider it in his decision. Rather, the documents sent by Ms. Chelhot included a letter from Dr. El Bitar, which is listed in the Certified Tribunal Record.

**B.** ***The officer's decision***

[12] In his decision dated November 20, 2014, the officer rejected Ms. El Dor's visa application under subsection 38(1) of IRPA, on the grounds that Jad [translation] "is a person

whose health status, personality disorder and autism spectrum disorder might reasonably be expected to cause excessive demand on health or social services in Canada."

[13] The additional documents sent by Ms. El Dor (following receipt of the fairness letter) did not provide a basis for modifying Dr. Thériault's preliminary assessment of Jad's health status. On November 12, 2014, after having reviewed the additional information provided by Ms. El Dor, Dr. Thériault said he believed that [translation] "neither the diagnosis, nor the services recommended for Jab are challenged. They are in fact confirmed by all the documents submitted." As a result, the medical opinion he provided on June 3, 2014 is upheld.

[14] The officer noted in his decision that Ms. El Dor did not challenge the initial diagnosis nor the expected service delivery costs for treating Jad's health condition in Quebec. However, the officer did not approve Ms. El Dor's commitment to cover the costs of treating Jad's medical condition and placing him in a private special-needs school. These schools receive substantial subsidies from the Quebec Department of Education, and Jad will be eligible to receive these services when he comes to Canada. Also, the officer was of the opinion that Ms. El Dor did not submit an adequate plan to mitigate the cost of providing social services for Jad, whose care is expected to cost about $43,000 per year.

## C. *Provisions of the Act*

[15] The relevant provisions are set out in subsection 38(1) of IRPA, which stipulates that a foreign national is inadmissible on health grounds if their health conditions might reasonably be expected to "cause excessive demand on health or social services." For its part, the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] defines "excessive demand" in subsection 1(1) as "a demand on health services or social services for which the anticipated costs would likely exceed average Canadian per capita health services and social services costs over a period of five consecutive years immediately following the most recent medical examination required [...]." Finally, Section 34 of the IRPR stipulates that before concluding whether a foreign national's health condition might reasonably be expected to cause excessive demand, an officer who is assessing the foreign national's health condition shall consider any reports made by a health practitioner.

## D. *Standard of review*

[16] The standard of review for assessing a visa officer's factual findings is reasonableness (*Ma v. Canada (Citizenship and Immigration)*, 2013 FC 131 [*Ma*] at para. 23; *Firouz-Abadi v. Canada (Citizenship and Immigration)*, 2011 FC 835 at para. 10). The standard of review for assessing the reason for rejecting the visa application and denying entry into Canada on medical grounds is also reasonableness because these are questions of mixed fact and law (*Burra v. Canada (The Minister of Citizenship and Immigration)*, 2014 FC 1238 [*Burra*] at para. 10; *Banik v. Canada (Citizenship and Immigration)*, 2013 FC 777 [*Banik*] at para. 18).

[17] In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. The grounds for a decision are deemed reasonable "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* , 2011 SCC 62 [*Newfoundland Nurses*] at para. 16; *Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para. 47). In this context, the Court must show restraint and deference to the tribunal's decision and cannot substitute its own reasons, but it may, if it finds it necessary, look to the record for the purpose of assessing the reasonableness of the outcome (*Newfoundland Nurses* at para. 15).

[18] Procedural fairness issues, for their part, are to be determined on the basis of a correctness standard of review (*Mission Institution v. Khela* , 2014 SCC 24 at para. 79; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 43). The question that now arises is not really whether the decision was "correct," but rather whether, in the end, the process followed by the decision-maker was fair (*Majdalani v. Canada (Citizenship and Immigration)*, 2015 FC 294 at para. 15; *Krishnamoorthy v. Canada (Citizenship and Immigration)*, 2011 FC 1342 at para. 13). The issue of whether a tribunal's record is complete or incomplete is also reviewable on a standard of correctness (*Clarke v. Canada (Citizenship and Immigration)*, 2009 FC 357 [*Clarke*] at para. 9).

[19] Similarly, correctness is the applicable standard of review for evaluating the obligations of the designated physician or the visa officer with respect to the issue of individualized assessment (versus a generic assessment) of an applicant's health status (*Sapru v. Canada (Citizenship and Immigration)*, 2011 FCA 35 [*Sapru*] at para. 16; *Ravis Cuarte v. Canada (Citizenship and Immigration)*, 2012 FC 261 at para. 13; *Mazhari v. Canada (Citizenship and Immigration)*, 2010 FC 467 [*Mazhari*] at para. 10). Finally, matters of procedural fairness and natural justice, such as whether a party has had a fair opportunity to know and meet the case before it, are reviewed on a standard of correctness (*Burra* at para. 9).

## III. Analysis

### A. *Did the officer's decision ignore the evidence and breach the rules of procedural fairness?*

[20] Ms. El Dor alleged that Dr. Thériault's affidavit stating Dr. Dib's letter was not included in the documents sent by Ms. Chelhot was an admission that the officer's decision ignored a material part of the evidence. In her written submissions, Ms. El Dor claimed that the officer failed to consider three of the documents attached to Ms. Chelhot's October 2014 letter, exhibits A-3, A-4 and A-7. However, at the hearing before the Court, Ms. El Dor acknowledged that her life plan dated October 6, 2014 (exhibit A-7), as well as Jad's 2012-2014 report cards (exhibit A-3), first reported to be missing, were in fact in the Certified Tribunal Record and were therefore before the officer when he made his decision.

[21] The only evidence that the officer would have ignored was therefore Dr. Dib's letter dated September 2013 (exhibit A-4). Ms. El Dor emphasized the capital importance of this medical assessment, which, according to her, contradicted the examining physician's opinion regarding the severity of Jad's disorder, and in the same breath, downplayed Jad's needs in terms of health and social services.

[22] Ms. El Dor submitted an accurate chronology of the steps that led to sending documents in response to the fairness letter, supported by her own affidavits and Ms. Chelhot's affidavit. In addition, another affidavit signed by an executive assistant of the law firm representing Ms. El Dor in Quebec confirmed that the firm had submitted a copy of Ms. Chelhot postal receipt. Ms. El Dor also said she submitted Dr. Dib's letter to the Minister on two separate occasions. First, the letter was in the package mailed October 6, 2014. She also personally delivered the letter to the designated physician who assessed Jad's medical condition on September 28, 2014.

[23] Finally, Ms. El Dor questioned the probative value of Dr. Thériault's affidavit and criticized the fact that he had not read the affidavits other than Ms. Chelhot's when he submitted his own. Ms. El Dor also raised the fact that Dr. Thériault stated on two occasions (in the CAIPS notes and in his affidavit) that the package received from Ms. Chelhot in October 2014 contained 148 pages. However, in its current form, the postal package in the Certified Tribunal Record contained only 132 pages. It therefore appeared that 16 pages were missing in the package sent by Ms. Chelhot, currently in the Certified Tribunal Record. Ms. El Dor cannot identify all the missing pages, but suggested that Dr. Dib's one-page letter was definitely among them.

[24] According to Ms. El Dor, the documents submitted in October 2014 clearly challenged the diagnosis with respect to the severity of Jad's disorder. Dr. Dib's letter used the word "mild" to describe the severity of Jad's disorder. Ms. El Dor also challenged the examining physician's qualitative assessment and claimed, based on the report cards, that Jad was self-reliant, understood instructions and demonstrated various abilities. Finally, Ms. El Dor did not agree with the extent of services required by Jad as described in the examining physician's assessment, and submitted her own assessment of services required by the child.

[25] After having reviewed the evidence, the Court cannot share Ms. El Dor's point of view on the documents submitted in October 2014. The Court first notes that the evidence apparently ignored by the officer, according to Ms. El Dor, actually includes only Dr. Dib's medical opinion, because the other exhibits cited by Ms. El Dor in her submissions are in the Certified Tribunal Record. This is the case for Jad's report cards and Ms. El Dor's mitigation plan, her bank statements, titles to property and the articles on autism included in the package sent by Ms. Chelhot.

[26] However, according to the Court, the balance of probabilities that the only document that Ms. El Dor criticizes the officer and the examining physician for having ignored, i.e. Dr. Dib's letter dated September 26, 2013, was never sent in response to the officer's fairness letter. Dr. Thériault's affidavit states that he did not receive this letter written by Dr. Dib; according to his testimony, it was not included in the package the Minister received from Ms. Chelhot, and the letter was not part of the Certified Tribunal Record. Also, the cover page of Ms. Chelhot's package does not specifically mention Dr. Dib's letter; it refers only to a document described as

[translation] "[t]he medical report regarding Jad," using the singular and not specifying the name of the physician who wrote it. The use of the singular indicates that Ms. Chelhot sent only one medical assessment. However, the package that the Minister received from Ms. Chelhot and the Certified Tribunal Record did in fact contain a medical report, Dr. El Bitar's letter dated September 26, 2014. The Court observes that Ms. Chelhot's cover page does not specify the number of pages in her package, and does not provide a detailed list of the exhibits attached. Finally, the Court notes that, in comparison with the Certified Tribunal Record, there are two documents missing in the file submitted by Ms. El Dor in this appeal: Dr. El Bitar's letter and a letter from Mosaik du Foyer de la Providence, a special-needs school.

[27] Moreover, the Court has no option but to list the numerous irregularities that undermine Ms. El Dor's claims and undercut the reliability of the affidavits submitted in support of these submissions. First of all, September 28, 2014, the date on which Ms. El Dor claims to have personally delivered Dr. Dib's letter to a [translation] "designated physician who performed Jad's medical assessment" does not appear anywhere in the Certified Tribunal Record. The file does not contain any reference to a medical examination that Jad would have undergone on this date. Furthermore, there is no mention of this date or an attending physician other than Dr. Thériault in the CAIPS or the letters sent by the visa officer. The Court therefore finds no support for this assertion by Ms. El Dor.

[28] With respect to the package sent by Ms. Chelhot in October 2014, the Court notes that there were also some obvious differences between the evidence in the Certified Tribunal Record and the evidence submitted in the affidavits filed by Ms. El Dor in support of her position. First, the figures indicated in Jad's report cards from two sources did not coincide and listed different results for Jad's performance, for example, with respect to comments on Jad's psychomotor development. There were also inconsistencies between the bank statements, which do not cover the same period in Ms. El Dor's file as the documents in the Certified Tribunal Record. Finally, there were two pages missing from Ms. El Dor's file that were nevertheless included in the Certified Tribunal Record, i.e. Dr. El Bitar's letter and the letter from Mosaik du Foyer de la Providence, a special-needs school. These repeated differences and these omissions are difficult to explain and give rise to serious doubt, in the eyes of the Court, on the tenor and content of the documents which, according to Ms. El Dor, would in fact have been submitted to the officer along with Ms. Chelhot's letter dated October 6, 2014.

[29] The Court notes in passing that Dr. El Bitar's medical report (upon which Ms. El Dor is silent) confirmed the diagnosis of autism and Jad's need for specialized therapy. The notes in the examining physician's file actually refer to this medical assessment.

[30] Under these circumstances, the Court considers the Certified Tribunal Record and the evidence submitted by Dr. Thériault more persuasive and can only give limited weight to Ms. El Dor's submissions regarding the documents actually sent to the officer in October 2014. As in *Singh Khatra v. Canada (Citizenship and Immigration)*, 2010 FC 1027 [*Singh Khatra*], the question before the Court is whether Ms. El Dor convinced me that Dr. Dib's letter was actually

delivered to the officer for review. Based on the facts and the evidence before the Court, I am not convinced that this is the case.

[31] That being said, the Court finds that, in any event, Dr. Dib's letter did not challenge the examining physician's diagnosis. The letter contains only a few lines and is dated September 26, 2013. It therefore preceded the July 4, 2014 fairness letter and the opinion Dr. Thériault provided in June 2014. Dr. Dib's letter could therefore not challenge the examining physician's diagnosis, because Dr. Dib could not have been aware of it in September 2013. Similarly, in her documents, Ms. El Dor does not deny the extent of services required by Jad, and her life plan in fact recognizes that her child suffers from pervasive personality disorder and autism spectrum disorder and must be treated by a multidisciplinary medical team despite the progress observed.

[32] To meet the burden of proof by a balance of probabilities, Ms. El Dor had to demonstrate that she had provided all of the relevant information and documentation to convince the officer (*Singh Khatra* at para. 5), and that the officer ignored them. Where the Certified Tribunal Record does not contain a document or make any reference to such a document, a bare assertion by the applicant that the document was sent will not suffice to meet this burden (*Singh Khatra* at para. 6; *Adewale v. Canada (Citizenship and Immigration)*, 2007 FC 1190 at para. 11). All the more so when the docket reveals evidence to the contrary and when several documents allegedly submitted are not even consistent with those the Court has in its file. The probative value of the affidavits submitted by Ms. El Dor is therefore undermined by these multiple factual contradictions.

[33] The Court is of the opinion, that in the circumstances, the officer did not violate any principles of natural justice or rules of procedural fairness. The preponderance of the evidence before the Court indicates that Dr. Dib's letter, which Ms. El Dor criticizes the officer and the examining physician of having ignored, was not available to the decision-makers. As a result, neither the officer nor Dr. Thériault could have known whether the package they received from Ms. Chelhot was incomplete or consistent with what she thought she had sent. The Minister is not under any obligation to determine the package delivery route and establish who opened the package and how it was opened. The burden of proof is always with Ms. El Dor and she must suffer the consequences of a failure on her part to send all the required documents or an error in the delivery of her mail.

[34] Finally, the Court notes that the cover page of Ms. Chelhot's letter did not specifically state that the attached documents included Dr. Dib's letter. The cover page made reference only to a "medical report" (and the Minister did in fact receive the medical report prepared by Dr. El Bitar). This is not a situation, as in *Miller v. Canada (Citizenship and Immigration*), 2015 FC 371 at para. 20, where a visa office failed to exercise diligence when the applicant specifically indicated in his letter that a specific document was attached and that the applicant had no way of knowing that the document was missing if the officer did not notify him. In this case, there was no breach of procedural fairness (*Naderika v. Canada (Citizenship and Immigration)*, 2015 FC 788 at paras. 24-25).

[35] Certainly, these considerations must take into account the fact that 16 pages do actually seem to be missing from the Certified Tribunal Record, as it appears in Dr. Thériault's affidavit and his CAIPS notes. Ms. El Dor argues that Dr. Dib's letter is definitely one of these missing pages. The Court finds that this is not the case and that the evidence does not support the conclusion that Ms. El Dor provided this letter. On the contrary, Dr. Thériault's affidavit established that Dr. Dib's report was not part of the tribunal's file. For all these reasons, there is no basis on which to argue that the officer's decision ignored the evidence or was in breach of the rules of procedural fairness.

**B.** ***Should the decision be set aside because the Certified Tribunal Record was incomplete?***

[36] This does not however change the fact that there were 16 pages missing from the Certified Tribunal Record with respect to the package Ms. Chelhot sent. The Court must determine whether the officer's decision must nevertheless be set aside for this reason.

[37] Ms. El Dor argues that the tribunal's failure to submit a complete Certified Tribunal Record is a violation of Rule 17 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [Rules] which stipulates that all papers relevant to the matter must be included in the Certified Tribunal Record. This violation would provide grounds for setting aside the officer's decision. Ms. El Dor maintains that these 16 pages conceal at least Dr. Dib's letter, which was a key element in the decision according to Ms. El Dor. It sharply contradicts the examining physician's diagnosis with respect to the severity of Jad's disorder.

[38] The Court does not agree. Although case law is not unanimous on the issue, a long line of cases establishes that in order for an incomplete Certified Tribunal Record file to lead to the setting aside of a decision the missing document must be "material to the decision." However, in this case, there is not enough evidence to determine which documents could be missing from the Certified Tribunal Record. None of those pointed out in Ms. El Dor's submissions are missing. Including Dr. Dib's letter. In addition, even if Dr. Dib's letter were considered missing, the Court is satisfied that his letter cannot be considered material to the officer's decision.

[39] The Court first notes that, in her affidavits in support of this application, Ms. El Dor is not able to identify the items missing from the Certified Tribunal Record. In her submissions before the Court, she emphasized Jad's report cards, the mitigation plan to offset the cost of Jad's treatments and Dr. Dib's letter included in the package sent by Ms. Chelhot. However, Ms. El Dor recognized that the two first items were in fact in the Certified Tribunal Record. Also, for the reasons outlined above, the Court concludes that Dr. Dib's letter was never part of the Certified Tribunal Record. Furthermore, none of the documents that Ms. El Dor identified as having been overlooked by the officer were part of the 16 pages apparently missing from the Certified Tribunal Record.

[40] Thus, 16 pages seem to have been omitted from the Certified Tribunal Record, but the Court cannot identify which are missing or what they may have dealt with. In fact, the Court can only determine that Ms. El Dor did not identify what 16 pages were missing from the package that Ms. Chelhot sent and what impact they could have on the officer's decision. This is definitely not sufficient to invalidate the officer's decision.

[41] In addition, the Court shares the Minister's opinion that even if the number of pages missing from the Certified Tribunal Record were considered, Dr. Dib's letter would not have been a document material to the decision. It was written September 26, 2013, before the fairness letter dated July 4, 2014 and before Dr. Thériault's June 2014 medical opinion. As such, it does not deal with the concerns raised by the examining physician. Also, it is only a few lines long, refers to the [translation] "mild" character of Jad's autism disorder and actually confirms Dr. Thériault ulterior diagnosis (which described the condition as [translation] "moderate to severe"). Jad has been found to be medically inadmissible because of the excessive demand he would cause, and Dr. Dib's letter would do nothing to change this. It does not challenge the examining physician's diagnosis of Jad's pervasive developmental disorder, his cognitive test results (11/30), that the care and services requested are estimated at $43,068 or that the services are subsidized by the government.

[42] In paragraph 44 of *Stemijon Investments Ltd. v. Canada (The Attorney General of Canada)*, 2011 FCA 299, the Federal Court of Appeal stated that "[j]ust because a decision is unreasonable does not mean that it must automatically be set aside and returned to the decision-maker for redetermination. Relief on an application for judicial review is discretionary." According to Rule 17, the tribunal shall prepare a Certified Tribunal Record with "all papers relevant to the matter that are in the possession or control of the tribunal." However, the failure to provide a certified record in accordance with the Rules does not, in itself, warrant automatic quashing of the decision (*Li v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 498 [*Li*] at para. 15). An incomplete Certified Tribunal Record may be a basis for a breach of procedural fairness; "that is not always so, especially where there was no actual unfairness"

(*Nguesso v. Canada (Citizenship and Immigration)*, 2015 FC 879 at para. 159; *Patel v. Canada (Citizenship and Immigration)*, 2013 FC 804 at para. 32; *Clarke* at para. 17).

[43] The burden of proof is very high when the missing document is material to the decision: "a breach of Rule 17(b) will justify setting the decision aside when the evidence missing from the certified record was particularly material to the finding under review" (*Machalikashvili v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 622 [*Machalikashvili*] at para. 9). For example in *Machalikashvili*, the Certified Tribunal Record did not include any of the material from the applicant's file that was considered by the visa officer and upon which he based his final assessment of Mr. Machalikashvili's credibility. Case law refers to evidence that is "material to the decision" (*Nguesso v. Canada* (*Citizenship and Immigration)*, 2015 FC 102 at paras. 84, 94; *Aryaie v. Canada (Citizenship and Immigration)*, 2013 FC 469 at para. 26; *Yadav v. Canada (Citizenship and Immigration)*, 2010 FC 140, [*Yadav*] at para. 36; *Narcissse v. Canada (Citizenship and Immigration)*, 2007 FC 514 at para. 18). In *Yadav*, much of what was missing in the Certified Tribunal Record was found in the response to the *Privacy Act* request. The information was relevant and should have been part of the Certified Tribunal Record, but because the immigration officer's "decision as a whole did not rely on" it, the decision was upheld (*Yadav* at para. 37).

[44] Neither the *Li* decision cited by Ms. El Dor, nor the other precedents indicate that a decision will automatically be set aside if the Certified Tribunal Record is incomplete. In this case, there is no material evidence on what is missing from the Certified Tribunal Record, and no cogent evidence that the officer's decision could have been different because an item was missing from the Certified Tribunal Record. Under these circumstances, the Court is of the opinion that there is no basis for setting aside the officer's decision because the Certified Tribunal Record appears to be incomplete.

### C. *Did the examining physician err in ignoring part of the evidence submitted and performing a generic assessment of Jad's condition?*

[45] Ms. El Dor also argued that the examining physician ignored some material evidence. This evidence challenged the severity of Jad's disorder, the physician's qualitative assessment and the services required for the child. This failure to consider the evidence submitted would have led to an unreasonable and erroneous conclusion. In this regard, Ms. El Dor referred to her October 6, 2014 statement that: [translation] "[Jad] is self-reliant, understands instructions and has various abilities [...]" and the child's report cards. With respect to the extent of services required for Jad, Ms. El Dor submitted her own assessment of the services required for the child. Finally, Ms. El Dor submitted that the officer's rejection letter seems to indicate he had reviewed some documents, whereas only the physician has the prerogative to perform this type of review.

[46] Ms. El Dor also alleged that the examining physician did not perform an individualized assessment of Jad's health status, contrary to the requirements developed by the Supreme Court in *Hilewitz v. Canada (Minister of Citizenship and Immigration); De Jong v. Canada (Minister of Citizenship and Immigration),* 2005 SCC 57 [*Hilewitz*]. She argues that the magnitude of the gap between the examining physician's report and the evidence submitted (after the fairness letter) is the result of an error in considering the evidence. The examining physician would not have questioned the specific way in which the child's condition manifests itself, but rather, would have performed a generic assessment.

[47] The Court does not share Ms. El Dor's opinion and her reading of the facts. Rather, the Court finds that the examining physician properly considered all the evidence submitted and his opinion is reasonable. His notes also mention that he read the whole medical file and the additional documents submitted by Ms. El Dor with Ms. Chelhot's letter dated October 2014. A tribunal is assumed to have considered all the evidence in the file and there is no obligation to comment on it in detail (*Kanagendren v. Canada (Citizenship and Immigration),* 2015 FCA 86 at para. 36).

[48] The Court also notes that Ms. El Dor does not challenge the examining physician's diagnosis or the extent of services required. She recognizes that Jad suffers from pervasive personality disorder and autism disorder in her life plan and that, although he has made some progress, he must be treated by a multidisciplinary medical team. Ms. El Dor does not question the child's cognitive test results (11/30) and does not contradict the public health services costs or that they are subsidized by taxpayers. In light of the evidence, the Court is not persuaded that

the decision is unreasonable and that the examining physician erred in asserting that the services recommended for Jad are not challenged. In fact, Dr. El Bitar's letter supports these conclusions.

[49] It is true that the examining physician could have elaborated on the assets of Ms. El Dor's family. However, there was no obligation to do so. It is not a clear and direct contradiction with a piece of evidence; "nor are [tribunals] required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it" (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998) FCJ No 1425 at para. 16; *Uluk v. Canada (Citizenship and Immigration)*, 2009 FC 122 at para. 26). There is nothing in the file that provides a basis for saying the examining physician ignored part of the evidence. It is not for the Court to question how the examining physician and the officer weighed the facts that they considered based on their expertise. The decision certainly falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[50] With respect to the individualized assessment, the evidence shows that far from having performed a cursory examination based on the general symptoms of autism, the examining physician performed an individualized assessment of Jad's condition. In this regard, the officer refers to the physician's notes as follows:

> His diagnosis was confirmed based on all the information gathered. Jad is a 10-year old boy suffering from pervasive personality disorder and autism disorder who has been treated by a multidisciplinary medical team for several years.
>
> The designated physician assessed Jad's cognitive function during the October 2013 immigration examination and he scored 11/30, which is a moderate to severe cognitive impairment score. Jad is capable of making eye contact, paying attention and interacting; however, his speech is limited, consisting of imitation, stereotypical utterances and echolalia. Jad is good at understanding

> instructions, but it goes without saying that he can eventually lose his bearings or train of thought when the tasks involved are too complex. He seems anxious and afraid of everything around him.
>
> […]
>
> It can reasonably be expected that he will have to be treated by a multidisciplinary team of specialists consisting of pediatricians, child development specialists, psychologists, psychiatrists, speech therapists and psychomotor specialists, and he will also receive a special-needs education […] until 21 years of age.

[51] In *Hilewitz* at para. 56, the Supreme Court requires an individualized assessment of likely demands an individual might reasonably be expected to cause on social services. Case law pursuant to *Hilewitz* is very clear with respect to the requirement for an individualized assessment (*Sapru* at para. 6, *Deol v. Canada (Minister of Citizenship and Immigration),* 2002 FCA 271 [*Deol*] at para. 60; *Mazhari* at para. 12). The Court finds that the principle of individualized assessment was fully respected in this case. Ms. El Dor's assertion that the wide gap between the examining physician's diagnosis and the evidence revealed that [translation] "he did not question the specific way in which the child's condition manifests itself" and that it was a generic assessment is completely unfounded.

## D. *Did the decision makers err in performing an individualized assessment of the mitigation plan submitted by Ms. El Dor and providing reasons for its rejection?*

[52] In her mitigation plan, Ms. El Dor undertook to cover all of Jad's expenses and make every effort to ensure that Jad would not cause excessive demand on Canadian social services, including enrolling him in a private special-needs school and a rehabilitation centre for children with autism. On the other hand, in his decision, the officer asserted that Jad would cause

excessive demand on social services because most of the target services were subsidized by the Government of Quebec. Ms. El Dor stressed that this assessment amounted to denying permanent residence in Canada to all persons who could require a special-needs education in the country, regardless of their financial situation. She argued that such a finding was unreasonable and the result of a generic assessment rather than an individualized assessment of her mitigation plan. Ms. El Dor had submitted a bank statement in the amount of US$243,000 and real property holdings estimated at $3.2 million (Canadian). According to Ms. El Dor, the family's savings could easily cover all of Jad's education costs and the cost of services he would receive as an adult.

[53] The Court does not agree with Ms. El Dor. On the contrary, the Court is of the opinion that the officer could reasonably conclude that the plan submitted by Ms. El Dor would not mitigate the excessive demand that Jad would cause on social services because most of the target services were subsidized. His finding that the mitigation plan submitted by Ms. El Dor was not sufficient falls within a range of possible acceptable outcomes. Ms. El Dor said that she would enrol her son in a special-needs school and a rehabilitation centre for children with autism. However, she did not look into the availability and cost of these services or make any arrangements with service providers in Canada.

[54] The examining physician conducted a thorough review of the mitigation plan prepared by Ms. El Dor and was right in finding that it was not reasonable. It was acceptable to consider that the plan ignored the fact that the specialized services required by Jad were subsidized by government and that Jad would automatically be entitled to these services upon his arrival in

Canada. The reasons for the decision are intelligible and transparent, and the quality of the decision-maker's reasons do not provide grounds for independent review.

[55] Furthermore, it is well established that a letter of intent that confirms one's intention not to burden the public system, when that individual has the financial capacity to pay for all services publicly accessible to all is insufficient (*Deol* at para. 46; *Burra* at para. 33; *Ma* at para. 26; *Zhang v. Canada (Citizenship and Immigration),* 2012 FC 1093 at para. 20; *Hassan Chaudhry v. Canada (Citizenship and Immigration),* 2011 FC 22 at para. 52). Such a document does not eliminate the reasonable expectation of causing excessive demand on health and social services in Canada. The applicant's (or his parents') financial capacity is not the most important factor to be considered (*Ma* at para. 29).

[56] Reasonableness is the standard of review for assessing this issue, and the reasons for the decision are intelligible and transparent and permit the Court to determine whether the conclusion is within the range of acceptable outcomes (*Burra* at para. 38). A decision-maker is not required to make an explicit finding on each constituent element of the reasoning, however subordinate, leading to its final conclusion *(Newfoundland Nurses* at para. 16*)*. There is therefore no reason for the Court to intervene.

## E. *Did the officer breach the standards of procedural fairness by failing to send a second fairness letter?*

[57] Finally, Ms. El Dor argues that when an applicant's response is deemed insufficient, the visa officer is responsible for outlining the concerns in a second fairness letter in order to allow

the applicant to respond to these concerns. Failure to send a second fairness letter would breach the rules of procedural fairness.

[58] The Court finds this argument to be without merit. The first fairness letter dated June 4, 2014, clearly stated all the relevant concerns and gave Ms. El Dor a true opportunity to respond to them. There is no duty on the decision-making officer to advise the applicant on how to improve the application after being provided with a procedural fairness letter (*Banik* at para. 70). The law does not hold the Minister to a standard of procedural perfection (*Khan v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 345 at para. 22; *Burra* at para. 23). Also, the designated physician is not obligated to seek out information about the applicant; "[i]t is sufficient for the medical officer to provide a Fairness Letter that clearly sets out all of the relevant concerns and provides a true opportunity to meaningfully respond to all of the concerns of the medical officer" (*Sapru* at para. 32).

[59] Ms. El Dor received such a fairness letter and there was no legal obligation to send her a second letter. It is clear to the Court that the officer did not breach any rules of procedural fairness in this regard.

## IV. Conclusion

[60] For the foregoing reasons, Ms. El Dor's application for judicial review is dismissed. The decision of the officer who denied her application for permanent residence on health grounds is transparent and intelligible, and falls within a range of possible, acceptable outcomes which are

defensible in respect of the facts and law. In addition, at no time did the procedure followed by the officer and the examining physician violate their obligations of procedural fairness.

[61] The parties did not raise any questions for certification in their written and oral representations, and I agree that there are none in this case.

## JUDGMENT

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

1. The application for judicial review be dismissed, without costs;

2. No serious questions of general importance will be certified.

"Denis Gascon"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-784-15 |
| **STYLE OF CAUSE:** | ROLA EL DOR v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | MONTRÉAL, QC |
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| **DATED:** | DECEMBER 21, 2015 |

**APPEARANCES:**

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