Federal Court | Cour fédérale

**Date: 20130711**

**Docket: IMM-8552-12**

**Citation: 2013 FC 777**

**Ottawa, Ontario, July 11, 2013**

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

**BETWEEN:**

**BISWAJIT BANIK**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

### INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act) for judicial review of the decision of a Visa Officer (Immigration Officer) of the Consulate General of Canada in Sydney, Australia, dated 25 June 2012 (Decision), which refused the Applicant's application for permanent residence in Canada

because his son's health condition might reasonably be expected to cause excessive demand on social services, thus rendering the Applicant inadmissible to Canada.

**BACKGROUND**

[2] The Applicant is a 43-year-old citizen of Bangladesh. The Applicant's wife and son are also citizens of Bangladesh. The Applicant and his wife were trained in the medical field in Bangladesh. They have been studying in Australia since 2007, and reside there on student visas. In February, 2007, the Applicant submitted an application for permanent residence in Canada under the Federal Skilled Worker Category, with his wife and son listed as dependants. The Applicant's son, Arkojeet, is 9 years old and has Autism Spectrum Disorder (ASD).

[3] After applying for permanent residence, the Applicant received a letter from the Immigration Officer dated 12 April 2011, expressing concerns that Arkojeet's health condition might reasonably be expected to cause excessive demand on social services in Canada (Applicant's Record, page 30). The letter said that Arkojeet would likely be identified as a High Needs Student, and the cost of his special education would range from $12,000 to $27,000 per year. Respite care for the parents would likely be from $2,000 to $4,000 per year. Arkojeet would also require a psychological assessment which would cost between $2,500 and $3,000. The Immigration Officer stated that, before a final decision was made, the Applicant could submit additional information, including information on the Applicant's use of social services in Canada for the next five years, and an individualized plan to ensure that no excessive demand is imposed on Canadian social services. The letter stated that the Applicant must have a reasonable and workable plan, along with the financial means and intent to implement it.

[4] In response to this letter, the Applicant submitted a package on 16 July 2011 detailing his financial resources and setting out a plan for caring for Arkojeet over the family's first five years in Canada (Applicant's Record, page 35). The Applicant included a chart listing the anticipated costs related to concerns identified by the Immigration Officer, measured against the family's available assets.

[5] In the Applicant's plan, he noted that he and his wife are both medically trained, and his wife has received special training in dealing with children who experience developmental delays. The Applicant has $262,423 in available funds, which includes a gift from his parents of $154,969, in the form of fixed deposits and savings certificates at different financial institutions in Bangladesh. The estimated cost of Arkojeet's needs ranged from $72,500 to $158,000, but even taking the maximum projected cost, the Applicant says he will be financially capable of meeting it. The family would also have the financial support of the Applicant's parents, should it be necessary. The Applicant's sister-in-law resides in Ottawa, and would provide any required financial and other support to the Applicant, as the family intends to reside in Ottawa.

[6] The Applicant also requested that humanitarian and compassionate (H&C) factors be considered. He pointed out that he has been waiting for a decision since January, 2007, and that the special education Arkojeet requires is not available in Bangladesh. The Applicant submitted that Arkojeet has been doing well at his Australian school, and provided copies of his progress reports. Arkojeet has been attending a special school in Australia and has never used any publicly funded services there. The Applicant and his wife are both highly educated, and would

be able to make valuable contributions to Canadian society. Further, the Applicant has significant family support.

[7] By letter dated 25 June 2012, the Immigration Officer concluded that Arkojeet is inadmissible to Canada because he might reasonably be expected to cause excessive demand on social services, and refused the application.

**DECISION UNDER REVIEW**

[8] The Decision under review in this application consists of the Exclusion Letter dated 25 June 2012 and the Officer's Global Case Management Systems notes (Notes).

[9] In the Notes dated 25 June 2012, the Immigration Officer noted that the Applicant's submissions on his plan for Arkojeet's care had been sent to a medical officer (Medical Officer) at Overseas Health Management Services in Singapore for review. The Medical Officer found that the Applicant's submissions did not modify the initial inadmissibility finding for excessive demand on social services.

[10] The Applicant provided copies of communications between him and a school in Ottawa, but the representative of the school said that without an assessment she was unsure what would be the most appropriate placement for Arkojeet. The Immigration Officer noted that the Applicant did not provide any information on the cost or availability of private schooling if Arkojeet is not accepted into one of the special education public schools.

[11] The Applicant said he may be able to acquire private health insurance at a cost of $120 a month, but no documentation was provided from health providers, so the Immigration Officer was unable to determine what this insurance would cover. No details were provided about the costs of other therapies.

[12] The Applicant stated that during year 2 of his 5-year plan he intends to work part-time to care for his son while his wife enrols in a university program in either nursing or physiotherapy. The Applicant indicated that he would be financially dependant on his family during his initial relocation period to Canada.

[13] The Applicant said that the family intends to live in Ottawa, where his wife's sister resides. The Applicant provided a Letter of Assurance from the sister, who said that she would provide the family with accommodation and financial support. However, the Applicant made enquiries of the University of Regina, McGill University, and McMaster University, all of which are outside the Ottawa region. The Applicant did not account for the additional cost if one parent is required to be away from Ottawa.

[14] The Immigration Officer found that the Applicant's submissions did not change the determination that Arkojeet might reasonably be expected to cause excessive demand on social services. Thus, the Applicant remained inadmissible.

**ISSUES**

[15] The Applicant raises the following issues in this application:

a. Should the reasons provided in the medical inadmissibility proceedings include the reasons of the Medical Officer?

b. Did the Medical Officer and the Immigration Officer err in failing to provide adequate reasons?

c. Did the Medical Officer and the Immigration Officer err in failing to conduct an individualized assessment?

**STANDARD OF REVIEW**

[16] 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.

[17] The first issue was discussed by the Federal Court of Appeal in *Sapru v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 35 [*Sapru*]. The Court of Appeal characterized the obligations of the Medical Officer as a question of law and as involving matters

of procedural fairness (*Sapru* at paragraphs 24-27). As such, this issue is reviewable on a correctness standard.

[18] Both parties agree that the standard of review applicable to a decision on medical inadmissibility is reasonableness (*Sapru*). 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." Thus, any issue that may arise as to the adequacy of reasons will be considered in a context of the reasonableness of the Decision.

[19] 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."

[20] The Supreme Court of Canada emphasized in *Hilewitz v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 557 [*Hilewitz*] that medical inadmissibility must be considered in an individualized manner. Justice Luc Martineau recently found in *Sökmen v Canada (Minister*

*of Citizenship and Immigration)*, 2011 FC 47 at paragraph 3 that whether or not an officer's assessment was individualized is an issue that is determined on a standard of correctness.

[21] 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." Further, the Federal Court of Appeal in *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paragraph 53 held 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." The standard of review applicable to the issue in this application is correctness.

**STATUTORY PROVISONS**

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

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| **Application before entering Canada** | **Visa et documents** |
| **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. |
| […] | […] |

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| **Health grounds** | **Motifs sanitaires** |
| **38.** (1) A foreign national is inadmissible on health grounds if their health condition<br>(a) is likely to be a danger to public health;<br>(b) is likely to be a danger to public safety; or<br>(c) might reasonably be expected to cause excessive demand on health or social services. | **38.** (1) Emporte, sauf pour le résident permanent, interdiction de territoire pour motifs sanitaires l'état de santé de l'étranger constituant vraisemblablement un danger pour la santé ou la sécurité publiques ou risquant d'entraîner un fardeau excessif pour les services sociaux ou de santé. |
| […] | […] |
| **Inadmissible family member** | **Inadmissibilité familiale** |
| **42**. A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if | **42.** Emportent, sauf pour le résident permanent ou une personne protégée, interdiction 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. |

[23] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-27 are applicable in this proceeding:

| | |
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| **Definitions** | **Définitions** |
| **1.** (1) The definitions in this subsection apply in the Act and in these Regulations. | **1.** (1) Les définitions qui suivent s'appliquent à la Loi et au présent règlement. |

| | |
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| […] | […] |
| "excessive demand" means | « fardeau excessif » Se dit : |
| (a) 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 under paragraph 16(2)(b) of the Act, unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is no more than 10 consecutive years; or | a) de toute charge pour les services sociaux ou les services de santé dont le coût prévisible dépasse la moyenne, par habitant au Canada, des dépenses pour les services de santé et pour les services sociaux sur une période de cinq années consécutives suivant la plus récente visite médicale exigée en application du paragraphe 16(2) de la Loi ou, s'il y a lieu de croire que des dépenses importantes devront probablement être faites après cette période, sur une période d'au plus dix années consécutives; |
| (b) a demand on health services or social services that would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada as a result of an inability to provide timely services to Canadian citizens or permanent residents. | b) de toute charge pour les services sociaux ou les services de santé qui viendrait allonger les listes d'attente actuelles et qui augmenterait le taux de mortalité et de morbidité au Canada vu l'impossibilité d'offrir en temps voulu ces services aux citoyens canadiens ou aux résidents permanents. |
| "health services" "health services" means any health services for which the majority of the funds are contributed by governments, including the services of family physicians, medical specialists, nurses, chiropractors and physiotherapists, laboratory services and the supply of pharmaceutical or hospital care. | « services de santé » Les services de santé dont la majeure partie sont financés par l'État, notamment les services des généralistes, des spécialistes, des infirmiers, des chiropraticiens et des physiothérapeutes, les services de laboratoire, la fourniture de médicaments et la prestation de soins hospitaliers |

**ARGUMENTS**

**The Applicant**

**Preliminary Matter**

[24] As a preliminary matter, the Applicant raises the question of whether the reasons provided under Rule 9 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 (Rules) ought to have included the Medical Officer's reasoning. The Applicant submits that the reasons of the Medical Officer are essential in assessing whether a decision of medical inadmissibility is reasonable. It may also save judicial resources, because if full reasons are provided, litigation may not be necessary.

[25] In *Sapru*, above, the Federal Court of Appeal highlighted the importance of a medical officer's reasoning at paragraph 41:

> Having reviewed the respective roles of the immigration and medical officers, it follows from the obligation placed on an immigration officer to review the reasonableness of a medical officer's opinion that a medical officer must provide the immigration officer with sufficient information to enable the immigration officer to be satisfied that the medical officer's opinion is reasonable.

[26] The Applicant submits that he ought to have access to the Medical Officer's opinion, and that this issue goes beyond the mere adequacy of reasons. The Medical Officer's notes have now been submitted by the Respondent as part of the Affidavit of Stephanie Dodds, however, the Applicant submits that Rule 9 requires disclosure of both Officers' reasons and that waiting to provide the Medical Officer's reasons until after leave is granted is unacceptable.

**The Reasonableness of the Decision**

**The Adequacy of Reasons**

[27] The Applicant submits that the reasons provided must allow the reviewing court to ascertain whether a decision is reasonable. The Federal Court of Appeal affirmed that this applies to a medical officer at paragraphs 42-43 of *Sapru*:

> …a medical officer may provide adequate reasons in a report to the immigration officer. However, adequate reasons could also be provided orally if the immigration officer records the oral advice in the CAIPS notes, or in a combination of written and oral communications where the oral advice is recorded in the CAIPS notes. Thus, a medical officer might transmit his or her notes reflecting the medical officer's review and assessment of all of the relevant information, or an immigration officer might record in the CAIPS notes the relevant observations and conclusions of a medical officer made during the course of the collaborative process between the officers contemplated by Operational Bulletin 063. In every case, an immigration officer may seek clarification from a medical officer and record the response of the medical officer in the CAIPS notes. The reasons of a medical officer may be conveyed to an immigration officer by a combination of these or other methods.
>
> What is important is that at the time the immigration officer makes his or her decision on admissibility, the immigration officer must have sufficient information from the medical officer to allow the immigration officer to be satisfied that the medical officer's opinion is reasonable.

[28] The Applicant says that there is no indication in the Decision that the Medical Officer provided an explanation to the Immigration Officer as to why, after receiving the response to the procedural fairness letter, his or her opinion was not changed. The Immigration Officer simply summarizes the Applicant's submissions and then concludes that "Having carefully considered all the documentation provided it did not change this assessment of PA's family member's health condition, which has now become final…"

[29] The Applicant says that it is unclear, based on the above, which Officer actually arrived at the conclusion that Arkojeet's health condition is likely to constitute an excessive demand on social services. The decision in *Sapru* clearly states that it is an immigration officer's duty to review the reasonability of the medical officer's opinion, and not the reasonability of the applicant's response. There is no indication on the record as to what the Medical Officer's reasoning was, or how his analysis contributed to the ultimate conclusion.

[30] The Applicant points out that there is no way to evaluate whether or not the Medical Officer did, in fact, conduct the required re-assessment. Had both Officers undertaken their respective duties, there ought to have been some explanation as to why the Medical Officer's opinion had not been altered after receiving the Applicant's materials. In the absence of this, the Applicant submits that the assessment and reasons provided are inadequate.

[31] The Supreme Court of Canada stated in *Hilewitz*, above, at paragraph 55 that medical officers must consider both medical and non-medical factors. As such, the Medical Officer had an obligation to assess the reasonability of the Applicant's care plan, and his ability and intent to minimise the demand on social services. There is no indication that the Medical Officer considered any non-medical factors, such as the Applicant's financial position. The reasons simply state that the evidence did not change the Medical Officer's opinion of Arkojeet's "health condition."

[32] The Applicant submits that had the Medical Officer adequately considered all medical and non-medical factors, this assessment would have appeared in the reasons for the Decision. Specifically, the Applicant's submissions spoke to the lack of available educational options for

Arkojeet in Bangladesh, and the significant progress that he has made at his specialized school in Australia. There is no way to know if this was considered at all in the Medical Officer's opinion. The Applicant submits that the reasons provided are lacking in transparency and are wholly unreasonable.

**The Role of the Officers**

[33] The Applicant says that section 20 of the Regulations and sections 29-34 of the Act clearly delineate the roles of a medical officer and an immigration officer – the medical officer is to determine whether the applicant or his dependants has a health condition likely to cause excessive demand, and the immigration officer is to assess whether the medical officer's determination is reasonable (*Sapru* at paragraph 36).

[34] In this case, the Medical Officer left the Immigration Officer to assess the Applicant's financial ability and intent. In *Hilewitz* at paragraph 68, the Supreme Court of Canada was critical of the medical officer in that case doing the same thing. As such, the Applicant submits that the Medical Officer failed to discharge his legislated responsibility, and that because of this the Immigration Officer rendered an unreasonable decision.

**Individualized Assessment**

[35] In *Hilewitz*, the Supreme Court stated that officers must conduct "individualized assessments;" it is not enough to simply set forth what services a particular individual may have access to. They must assess the cost of the services that the person is likely to require:

> 56 This, it seems to me, requires individualized assessments. It is impossible, for example, to determine the "nature", "severity" or probable "duration" of a health impairment without doing so in relation to a given individual. If the medical officer considers the need for potential services based only on the *classification* of the impairment rather than on its particular manifestation, the assessment becomes generic rather than individual. It is an approach which attaches a cost assessment to the disability rather than to the individual. This in turn results in an automatic exclusion for all individuals with a particular disability, even those whose admission would not cause, or would not reasonably be expected to cause, excessive demands on public funds.

[36] It is clearly stated at paragraph 58 of *Hilewitz* that "The threshold is reasonable probability, not remote possibility."

[37] As per paragraph 55 of *Hilewitz*, the Applicant states that the Medical Officer was required to (1) assess cost estimates, (2) determine whether the cost estimates were reasonable, and (3) assess the "willingness and ability of the applicant or his or her family to pay for the services." The Applicant submits that all the Medical Officer said was that the Applicant had "provided some estimates of the cost of Arkojeet's education," and that this did not meet the standard set out in *Hilewitz*. Not only that, but the cost estimates mentioned by the Medical Officer were the maximum costs from the procedural fairness letter.

[38] The Applicant submits that the Immigration Officer committed the same errors discussed in *Hilewitz*. The Immigration Officer's notes provide that the Applicant and his wife "would be eligible for respite services" and that the services would "typically be in the range of $2,000 to $4,000 per year." In response to this, the Applicant provided a plan and financial documentation to demonstrate his ability to offset any excessive demand, should this be required. There is no

discussion as to why the Officers believed the Applicant and his wife would make use of such services, considering they have not done so in the past. The Applicant submits that this demonstrates that a generic methodology, as discussed in *Hilewitz* at paragraph 56, was applied.

[39] Further, the maximum cost of special education for Arkojeet was determined to be $27,000 per year. In response, the Applicant confirmed his commitment to pay this amount, and demonstrated his financial capacity to do so. The Applicant is a citizen of Bangladesh, with limited knowledge of the Canadian education system, but clearly communicated his intention to offset the costs of public schooling. The e-mail response to the Applicant from the Ottawa-Carleton District School Board said: "You mentioned that your child will not qualify for government funding and you would have to pay for education. Is this included in the information you received from Citizenship and Immigration Canada? Could you please send us a copy of the information you received to this effect." The Applicant submits that this indicates clearly that he had no intention for Arkojeet's education costs to be paid for by the government, and that he was simply unaware that he could not pay into the public school system.

[40] Further, the family has been privately funding Arkojeet's education in Australia for the past several years. In light of this, it was reasonable for the Applicant to believe that his statement that he was willing and able to pay for Arkojeet's education in the highest amount proposed by the Officer, together with proof of his financial resources, would be sufficient to alleviate this concern.

[41] The reasons do not indicate that the Immigration Officer had concerns about the Applicant's willingness or ability to assume the costs as set out. The Applicant's intention to contribute $27,000 annually towards Arkojeet's education was clearly set out, regardless of whether it would be spent in the public or the private school system.

[42] The Applicant submits that his particular circumstances and intentions were not acknowledged and assessed. The Immigration Officer even noted that the Applicant "has made great efforts to research both opportunities for himself and the care of his son." The Applicant submits that the Immigration Officer's failure to assess his particular circumstances was an error.

**The Respondent**

**The Reasonableness of the Decision**

**Adequacy of Reasons**

[43] The Respondent submits that the *Sapru* decision does not support the Applicant's argument that in every case an immigration officer must include the detailed reasons of a medical officer (particularly when the medical officer's position has not changed). *Sapru* held that the prospective immigrant must be provided with a "fairness letter" that sets out all relevant concerns and provides a true opportunity for the person to meaningfully respond to all the government's concerns.

[44] A medical officer must provide the immigration officer with sufficient information to permit the immigration officer to be satisfied that the medical officer's opinion is reasonable.

The Respondent submits that this was complied with in this case. As the Federal Court of Appeal said in *Sapru*, an applicant is not the focus as far as adequacy of reasons is concerned:

> 54 To conclude on this issue, when considering the inadequacy of the reasons of a medical officer the primary concern is not whether at the end of the day the appellants received adequate reasons. The concern is whether the inadequacy of the reasons prevented the immigration officer from assessing the reasonableness of the medical officer's opinion.

[45] The record indicates the Medical Officer reviewed all the Applicant's materials. The Immigration Officer would have been aware that the Medical Officer's decision was based on having reviewed all the evidence presented by the Applicant.

[46] The basis of the Immigration Officer's decision echoed the rationale described by the Medical Officer. Both decisions turned on the insufficiency of the Applicant's evidence and deficiencies in the proposed plan. The Applicant even acknowledged that his plan was deficient when it came to special education costs for his son. He stated in his covering letter that he believed the exact amount could only be determined after the family became landed immigrants and a psychological assessment was done. The Respondent submits that it is unreasonable for the Applicant to take issue with the medical assessment and then acknowledge that he did not provide the Officers with the information they requested in order to have a reasonable basis on which to avoid a medical inadmissibility finding.

[47] Jurisprudence of the Federal Court has confirmed that when a prospective immigrant claims the identified health condition will not create "excessive demand" because they have a plan to mitigate the likely demand, the plan must be "choate," in the sense of complete,

developed and certain (*Chauhdry v Canada (Minister of Citizenship and Immigration)*, 2011 FC 22 [*Chauhdry*] at paragraph 49; *Sharma v Canada (Minister of Citizenship and Immigration)*, 2010 FC 398 at paragraphs 16, 18; *Rounta v Canada (Minister of Citizenship and Immigration)*, 2007 FC 384 at paragraph 15).

[48] Specifically, in *Sapru* the Federal Court of Appeal said that "when an applicant submits a plan for managing the condition, the medical officer must consider and advise the immigration officer about things such as the feasibility and availability of the plan." The Immigration Officer in the present case recognized the Applicant's sincerity in putting together a plan which he believed would be sufficient, but the Applicant's failure to adequately research the availability and cost of private school special education simply left both Officers without sufficient evidence to reasonably approve the plan. The Respondent submits that the Applicant's plan was inchoate and therefore it was reasonably rejected.

[49] The Applicant simply accepted the cost estimates made by the Medical Officer and asserted he had the financial resources to pay for any services required out of his own resources. What he failed to do was investigate what is and is not available for his son in the Ottawa area. The onus is on the prospective immigrant to research his or her options and submit a detailed and realistic plan (*Chauhdry* at paragraph 50). An immigration officer must make a decision based on the information put forward by the applicant.

[50] Instead of acknowledging that he misunderstood the Canadian educational system, the Applicant points to an email from the Ottawa-Carlton School Board in an effort to demonstrate

that he anticipated paying for his son's school privately. This is the sort of "indirect" evidence the Medical Officer made reference to, and it was not the sort of information requested of the Applicant.

[51] The Applicant has acknowledged that he made a mistake by not providing information about private schools in Canada that provide special education. A "reasonable and workable plan" must be based on information that is correct, yet despite this significant error the Applicant believes that his plan is still somehow "reasonable and workable," and that his "financial means and intent to implement this plan" should have been enough to satisfy the Officer.

[52] The Applicant tries to rely on the leading jurisprudence concerning medical inadmissibility, but this case law is of no assistance to him because his plan of care was bereft of any information that directly responded to the Officers' concerns. The inadequacy of the plan of care hampered the Officers' ability to assess non-medical factors such as the Applicant's financial ability and intent to implement the plan.

[53] The Respondent submits there is no evidence that *Hilewitz* and *Sapru* were not complied with just because the Immigration Officer did not include the Medical Officer's reaction to the Applicant's fairness materials in the reasons or the Notes. Furthermore, the Applicant asserts that his response was not sent to the Medical Officer, when the Notes clearly indicate that the response was sent. In this case, the two Officers did in fact "operate in tandem to assess admissibility on health grounds."

[54] Furthermore, the Respondent submits that the Medical Officer did understand the scope of his responsibilities. The Medical Officer made the preliminary inadmissibility finding, which then caused the Immigration Officer to send out the procedural fairness letter. The Medical Officer then considered the Applicant's submissions, made a final determination, and sent it to the Immigration Officer for review.

[55] The Applicant submits that the Medical Officer did not properly assess the Applicant's "ability or intent to offset excessive demand," but this was because the Applicant did not provide the Medical Officer with the relevant information he needed. Thus, any assessment would have been meaningless because it would have been based on incomplete information (*Sapru*, paragraph 36).

[56] In the alternative, if the Court does find that there was a breach of procedural fairness, the Respondent submits that this type of error does not necessarily require the Decision to be redetermined. There is a line of jurisprudence from this Court standing for the proposition that a breach of natural justice is important only if it is material to the claim. Recently, the Court held in *Phillip v Canada (Minister of Citizenship and Immigration)*, 2012 FC 242 at paragraph 29:

> 29 In reaching this conclusion, Justice Mactavish relied on previous jurisprudence that only breaches of natural justice that affect the result will warrant a decision being set aside (see for example *Mughal v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1557, [2006] FCJ no 1952 at paras 39-41; *Fontenelle v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1432, [2006] FCJ no 1796 at para 15; *Yassine v Canada (Minister of Employment and Immigration)*, (1994), 27 Imm LR (2d) 135, [1994] FCJ no 949 at para 11 (FCA); *Mobile Oil Canada Ltd et al v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202; [1994] SCJ no 14 at para 53).

[57] The Respondent submits that the Applicant was not prejudiced by the breach of procedural fairness that he alleges occurred in the assessment of his application. Even if both Officers carried out their roles perfectly, it would not have remedied the fundamental flaw in the Applicant's submission – that he did not provide proper information in regards to Arkojeet's education in Canada. The final determination would have been the same; the application would have been rejected.

**Individualized Assessment**

[58] Contrary to the Applicant's arguments, the Respondent asserts that both Officers did perform individualized assessments for what services, and their associated costs, would likely be required. Both Officers noted the contents of a report by a specialist, which outlined exactly what Arkojeet's challenges are, as well as the Applicant's evidence of the needs of his son. Neither Officer considered services that were a remote possibility, but pointed out services and needs for the Applicant's son that were based on a reasonable probability, in compliance with *Hilewitz*.

**The Applicant's Reply**

[59] The Applicant submits that the Medical Officer's notes, attached in the Affidavit of Stephanie Dodds, do not provide an answer to the Applicant's concerns. The notes are merely a recitation of the Applicant's submissions, with the Medical Officer only commenting on the Applicant's error of approaching the public school board. It was the Immigration Officer's duty to assess the reasonability of the Medical Officer's conclusions. In order to do this the Immigration Officer should have been provided with the Medical Officer's reasoning, not merely

a statement that the original opinion has not changed since the Applicant did not identify the correct school.

[60] The Applicant continues to submit that the Medical Officer was required to provide "adequate reasons" to the Immigration Officer (*Sapru* at paragraphs 42, 54), and the Immigration Officer was required to assess the reasonability of those reasons. In respect to the Medical Officer's notes, the Applicant is particularly concerned with the conclusion that the "assessment of the applicant's 'ability and intent' I leave to the visa officer to assess." The Medical Officer must assess both medical and non-medical factors; in not considering all the submissions provided, the Medical Officer in this case failed to perform that duty.

**Procedural Fairness**

[61] The Applicant clearly believed he would be required to pay the amount set forth in the procedural fairness letter and provided evidence that he could do so. The Applicant continues to maintain that in failing to review all the evidence provided, the Officer did not conduct an individualized assessment.

[62] The Respondent is critical of the Applicant for not having researched private schooling in Canada for Arkojeet, and speaks of the "onus" resting with the Applicant. Although the Applicant contacted the public school board, he clearly believed that his son would "not qualify for government funding." The Applicant submits that this was a legitimate misapprehension. The Officers knew of this mistake for over a year before refusing the application, and the Applicant

states that fairness dictates that they should have given his plan more consideration and disabused him of the misapprehension.

**ANALYSIS**

[63] In my view, and taking into account the evolving submissions of the parties, the gravamen of the Applicant's complaint is that the Immigration Officer in this case rendered an unreasonable decision by relying upon the opinion of the Medical Officer who failed to discharge his duty of assessing excessive demand. The Applicant also now says that it was obvious that he had misapprehended the need to provide information and a viable plan regarding private education and support for Arkojeet, so that it was procedurally unfair not to alert him that such information was required, and not to give him an opportunity to make further submissions on point.

[64] In the present case, the Applicant says that the Medical Officer provided an opinion that did not address the Applicant's individual circumstances and specifically left considerations of financial ability and intent to the Immigration Officer. In other words, he says, the Medical Officer failed to discharge his legal duty to assess excessive demand on the basis of the individualized circumstances of this case, so that, in relying upon the Medical Officer's opinion, the Immigration Officer rendered an unreasonable Decision.

[65] I agree that the Medical Officer was obliged to conduct an individualized assessment that would take into account both medical and non-medical factors, "such as the availability, scarcity

or cost of publicly funded services, along with the willingness and ability of the applicant or his or her family to pay for the services." See *Hilewitz*, above, at paragraphs 43 and 44.

[66] As the record before me shows, the Medical Officer made a preliminary inadmissibility finding and the Applicant was given the opportunity to submit a detailed individualized plan "along with the financial means and intent to implement this plan." As the Applicant points out in his affidavit submitted with this application, he did not understand that he should have addressed private school costs:

> Had we known that we could only pay for private school, we would have gladly researched private school options and covered these costs.

In my view, this is a clear acknowledgment that the plan submitted by the Applicant was deficient in this highly material respect.

[67] The plan submitted by the Applicant did not provide information about the private education that Arkojeet might require in Canada. This information was needed to directly address the Medical Officer's concerns and, without it, the Medical Officer could not have assessed the non-medical factors such as the Applicant's financial ability to implement the plan, which the jurisprudence says the Medical Officer was obliged to assess. When the Medical Officer reviewed the documentation submitted by the Applicant, he noted that the Applicant had not addressed his concerns.

[68] The Applicant argues that the Medical Officer specifically left assessment of financial ability and intent to the Immigration Officer. However, the Medical Officer simply did not have

all of the information required to make such an assessment, and this is because the Applicant had failed to provide relevant information about the availability of private special education for Arkojeet in the Ottawa area and the costs of that education. The Applicant provided no information or evidence about private schools in the Ottawa area where Arkojeet could be enrolled, the curriculum offered, how any such curriculum would meet Arkojeet's needs, or the actual costs of enrollment and associated services. The omission of this information made it impossible for the Medical Officer to assess the Applicant's ability to pay, and the overall feasibility of the Applicant's plan. Hence, it was not unreasonable for the Medical Officer to indicate that his initial opinion had not changed or for the Immigration Officer to rely upon this unchanged assessment.

[69] The onus was on the Applicant to establish a reasonable working plan that the Officers, in their respective roles, could assess. As the Medical Officer pointed out in his assessment,

> In the information provided by the applicant concerning the demand on Canadian health and social services that the applicant has not directly addressed the issue of costs as required nor his/her "ability and intent" to pay for the services.
>
> Note: The applicant has contacted people in the public school system in Ottawa for advice concerning resources for the special needs of his autistic and mentally challenged son and has provided some estimates on the cost of Arkojeet's special education. There is however no mention of the private school in which he would be registered nor the yearly costs of the programs which often include physiotherapy and occupational therapy.
>
> In order to judge whether the Applicant has a viable plan, one needs specific information concerning who the providers are, preferably with letters of intent, and the yearly costs that would accrue…"

[70] The Applicant says that this mistake would have been obvious to both Officers and they should have alerted him to the deficiencies in his plan and provided him with an opportunity to make further submissions on point. As the Respondent points out, there was no duty on an Immigration Officer to advise the Applicant on how to improve his application after he was provided with a procedural fairness letter. See *Ikede v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1354 at paragraph 23.

[71] As the Applicant's affidavit submitted with this application makes clear, the Applicant was fully aware that the cost of education was "of most concern to the Officer," but, not realizing that the family "cannot pay for education in the Ottawa-Carleton District School Board," the family did not research or make submissions on "private school options" and their costs.

[72] The procedural fairness letter clearly asks the Applicant to address the "social services required in Canada for the period indicated above," and that the Applicant provide an "individualized plan to ensure that no excessive demand will be imposed on Canadian social services for the entire period indicated above, and your signed Declaration of Ability and Intent."

[73] Hence, I do not think the Fairness Letter misled the Applicant in any way as to what was required. His failure to research private school options and their costs was, he now acknowledges, his mistake because he did not realize that the family could not pay for public education in the Ottawa-Carleton School District. I accept that the Applicant did his best to address the issues raised in the procedural fairness letter, but he was represented by an

immigration consultant and any mistakes which he or his counsel made cannot now be disregarded.

[74] In the end, this case is about the failure of the Applicant to submit sufficient information on a crucial point of concern to the Officers. As Justice Roger Hughes pointed out in *Sharma*, above, at paragraph 18, "The onus rests on the Applicants to make out their case, including such factors as may be relevant in setting out a workable plan. The Officer committed no reviewable error in dealing with the matter based on the information available."

[75] As the Federal Court of Appeal made clear in *Sapru*, above, at paragraph 32,

> It follows that I would answer the first certified question as follows:
>
> > A medical officer is not obligated to seek out information about the applicants' ability and intent to mitigate excessive demands on social services from the outset of the inquiry. It 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.

In my view, the procedural fairness letter in the present case clearly sets out all of the relevant concerns and provided the Applicant with a true opportunity to respond to those concerns. The Applicant's own affidavit makes it clear that he understood it was the costs of education that was "of most concern to the Officer," and that he failed to fully address this concern because of his own misapprehension about public education in the Ottawa-Carleton School District. Although I am extremely sympathetic to the Applicant and the lost opportunity that this case represents, I cannot on

the jurisprudence make the Applicant's own admitted mistake the responsibility of the Officers, either by finding procedural fairness or an unreasonable error.

[76] Counsel agree there is no question for certification and the Court concurs.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**

i. The application is dismissed.

ii. There is no question for certification.

"James Russell"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-8552-12 |
| **STYLE OF CAUSE:** | BISWAJIT BANIK v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | JUNE 4, 2013 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | RUSSELL J. |
| **DATED:** | JULY 11, 2013 |

**APPEARANCES:**

| | |
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| Erin Roth | FOR THE APPLICANT |
| Michael Butterfield | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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