IMMIGRATION AND REFUGEE BOARD
(IMMIGRATION APPEAL DIVISION)

COMMISSION DE L'IMMIGRATION
ET DU STATUT DE RÉFUGIÉ
(SECTION D'APPEL DE L'IMMIGRATION)

IAD File No./ Dossie : TA6-08882
Client ID No./ No. ID client: 29149569

Reasons and Decision – Motifs et décision

SPONSORSHIP

Appellant(s) **Appelant(s)**

NEELAM MAKKAR

Respondent **Intimé**

The Minister of Citizenship and Immigration
Le Ministre de la Citoyenneté et de l'Immigration

Date(s) and Place of Hearing **Date(s) et Lieu de l'audience**

August 19, 2008
Toronto, Ontario

Date of Decision **Date de la Décision**

September 19, 2008

Panel **Tribunal**

Benjamin R. Dolin

Appellant's Counsel **Conseil de l'appelant(s)**

Harinder S. Gahir
Barrister and Solicitor

Minister's Counsel **Conseil de l'intimé**

Joel Bousfield

Canada

Reasons for Decision

Introduction

[1] These are the reasons for decision in the appeal of Neelam MAKKAR (the appellant) from the refusal of an application for a permanent resident visa made by her mother, Surjit Kaur SUKHIJA (the applicant). The appellant sponsored the applicant as a member of the family class but a visa officer determined that the applicant is inadmissible to Canada as a person whose health condition is likely to cause excessive demand on health or social services contrary to subsection 38(1) the *Immigration and Refugee Protection Act* (*IRPA*).

Issue and Decision

[2] The appellant brings her appeal pursuant to subsection 63(1) of *IRPA*. She challenges the legal validity of the refusal on the basis that excessive demand has not been established. In the alternative, she asserts that, taking into account the best interests of a child or children directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

[3] The appellant, who was represented by counsel, testified at the hearing and submitted documentary evidence.

[4] Having considered the evidence and submissions of the parties, I find that the refusal is valid in law. However, I also find that the appellant has established that special relief is merited in light of all the circumstances of this case.

[5] The appeal is allowed.

Background

[6] The appellant is the oldest of three children born in India to the applicant. She immigrated to Canada in 1993 with her husband and two children. They currently own and operate two jewellery stores.

[7] The appellant sponsored her mother and father for permanent residence. Her father passed away in early 2004 and the application for her mother continued. Following a medical examination, a so-called "fairness letter" was sent to the applicant. Dated April 7, 2006, the letter stated, in part:[1]

> …It appears that you may not meet the requirements for immigration to Canada.
>
> ….
>
> The medical officer has determined that you have the following medical condition or diagnosis:
>
> "OSTEROARTHRITIS OA OF KNEE JOINTS"
>
> This 67 year old applicant born on October 5, 1938, has severe osteo-arthritis of both knee joints. Her X-ray of the knee joints shows reduction in joint spaces especially in the medial tibio-femoral compartment, marginal osteophytes, tibial spiking, patellar beaking and subchondral sclerosis along medial joint line. She has varus and fixed flexion deformity with restricted movements of both knee joints. Her activities of daily living are limited. According to the recent specialist opinion, "She will require surgery in the form of total knee replacement in next 5 years."….This surgery is expensive and there already exist lengthy waiting lists in Canada for these services. Based upon my review of the results of this medical examination and all the reports I have received with respect to applicant's health condition, I concluded that she has a health condition that might reasonably be expected to cause excessive demand on health services.

[8] The "fairness letter" was largely based on a Medical Notification by Citizenship and Immigration Canada (CIC) Medical Officer Dr. Brian Dobie, which was also part of the Record.[2]

[9] The applicant was given 30 days to provide any information relating to her medical condition or diagnosis. In response to the "fairness letter", the appellant wrote the visa post indicating that she would pay for the cost of her mother's surgery whenever it is required.[3]

[10] In a refusal letter dated June 6, 2006, the applicant was told that she was inadmissible to Canada. The appellant launched this appeal and subsequently filed a medical letter from Dr. Balwant Singh Hunjan, dated March 1, 2007. That letter states in part:[4]

> This is to certify that I have examined Mrs. Surjit Kaur Sukhija…and found that she is suffering from Osteoartritis [sic] both knee…She came to me for the treatment of her disease. She was advised arthroscopy of the joints which was done on 13th Feb. 2007.

[1] Minister's Record, p. 27.
[2] Minister's Record, p. 26.
[3] Minister's Record, p. 30.
[4] Exhibit A- 1, p. 9.

> Now she is almost pain free while walking and her daily routine is quite comfortable. She can climb up the stairs very easily. Her radiographs show O/A changes. Looking into her present condition I am of the opinion that she will not require any surgery….no surgical procedure like joint replacement will be required during next five years or so.

[11] A supplemental statement from the CIC Medical Officer, dated June 6, 2007, was also tendered at the *de novo* hearing of this appeal. In it he states that he has reviewed Dr. Hunjan's letter but as "no information has been provided which would indicate that the original immigration medical assessment was incorrect", Dr. Dobie has not changed his opinion.[5]

Analysis — Legal Validity

[12] Section 38 of *IRPA* reads:

> 38. (1) **Health grounds**- A foreign national is inadmissible on health grounds if their health condition
>
> (a) is likely to be a danger to public health;
>
> (b) is likely to be a danger to public safety; or
>
> (c) might reasonably be expected to cause excessive demand on health or social services.

Excessive demand is defined in section 1(1) of the *Immigration and Refugee Protection Regulations* (*Regulations*) as:

> (*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 by these Regulations, 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
>
> (*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 the denial or delay in the provision of those services to Canadian citizens or permanent residents.

[5] Exhibit R-1.

Diagnosis and Prognosis

[13] The evidence, including the report from Dr. Hunjan provided by the appellant, establishes that the applicant has osteoarthritis of both knees. I am satisfied that the medical officer considered the applicant's specific test results and that his expert opinion is not undermined or seriously challenged by Dr. Hunjan's letter. In any event, as noted by Justice Tremblay-Lamer in *Gomes*, even with expert opinion evidence that contradicts the CIC medical officer, I cannot impugn his diagnosis:[6]

> The jurisprudence of the Federal Court has established clearly that a reviewing court is not competent to make findings of fact relating to the validity and accuracy of the medical officer's diagnosis and prognosis with respect to the identified health condition (Jiwanpuri v. Canada (Minister of Employment and Immigration) (1990), 10 Imm.L.R. (2d) 241.)

[14] As such I am satisfied that the applicant has osteoarthritis in both knees which might reasonably be expected to require joint replacement surgery.

Excessive Demand

[15] Although the case law suggests that the medical officer's diagnosis is generally unassailable, I can review his opinion with respect to whether the condition might reasonably be expected to cause excessive demand on health or social services.[7] The medical officer determined that the applicant might reasonably be expected to cause excessive demand because of the costs of knee replacement surgery and the length of existing waiting lists.

[16] The appellant has suggested that she will do whatever she can and pay whatever fees are necessary to prevent her mother from causing excessive demand on Canada's health system. But one cannot opt out of our heath care system. The issue was considered in *Deol* where the Federal Court of Appeal addressed whether an applicant's ability to pay for health services could be considered when assessing a permanent residence application. The court held that the

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[6] *Gomes v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1543 (T.D.), at para. 13.
[7] Ibid.

Immigration Appeal Division (IAD*)* had been correct when it refused to consider the appellant's ability to pay for his sponsored relative's medical treatment. At paragraph 46, the court held:[8]

> As has been held in several previous cases, it is not possible to enforce a personal undertaking to pay for health services that may be required after a person has been admitted to Canada as a permanent resident, if the services are available without payment. The Minister has no power to admit a person as a permanent resident on the condition that the person either does not make a claim on the health insurance plans in the provinces, or promises to reimburse the costs of any services required.

[17] While the appellant's ability to pay for her mother's health services is not something that should be considered, it is apparent from the Federal Court jurisprudence that there is a requirement that the medical officer provide an individualized assessment of the likely costs and/or the likely impact on waiting lists that the applicant's specific condition might reasonably be expected to cause. Justice Pinard stated in *Lau* that the "jurisprudence has clearly established that a finding of medical inadmissibility cannot be premised solely on the medical condition under review; rather, the individual applicant's personal circumstances must be carefully reviewed."[9] And in the *Manto* case, O'Keefe J. held that when considering excessive demand, "a medical officer must have some evidence before him relating to the supply of that health or social service in Canada."[10] I also note that the Supreme Court of Canada in *Hilewitz* made this clear in the context of determining excessive demand on certain social services (i.e., special education, vocational training and respite care).[11]

[18] In this case, the Appeal Record contains a document entitled "Musculoskeletal Disorders Condition Report" which was prepared by CIC's Immigration Health Policy Division in September 1996.[12] Although this document is not specifically mentioned in either the medical officer's report or the visa officer's notes, section 4(1)(d) of the *IAD Rules* requires that Appeal Record contain "any document that the Minister has that is relevant to the applications, to the reasons for the refusal or to any issue in the appeal." As it forms part of the Record, it is reasonable to infer that this document was used in assessing the prospective excessive demand that the applicant's medical condition might cause.

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[8] *Deol v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 949 (FCA).
[9] *Lau v. Canada*, [1998] 146 F.T.R. 116 (T.S.) at para. 10.
[10] *Manto v. Canada*, [2001] F.C.T. 572, at para. 26.
[11] *Hilewitz v. Canada*, [2005] S.C.J. No. 58, at para. 56.
[12] Minister's Record, pp. 36-75.

[19] This report, at page 60, indicates that osteoarthritis sufferers in Canada often have to wait a year for knee replacements and that the surgery costs the Ontario Health Insurance Plan at least $12,000, plus additional fees associated with therapy and recovery. The cost of medical procedures has not likely decreased since the report was written and there was no evidence before me to suggest that the wait list times referred to in the report are no longer accurate. As the onus is on the appellant to prove her case on a balance of probabilities and she has not provided any evidence to suggest that the reports findings are inaccurate, I find that the report has not been rebutted or undermined. As such, it constitutes the type of evidence required by the Court in *Lau* and *Manto* and reinforces the medical officer's expert opinion with respect to excessive demand.

[20] Counsel for the appellant argued that, because there was no evidence with respect to current average Canadian per capita health costs over a five-year period, excessive demand is not made out. He referred to the IAD decisions in *Sivapatham*[13] and *Desai*[14] in which the panels determined that medical refusals for osteoarthritis were legally invalid because there was no evidence of average per capita costs and no evidence linking wait times to increases in the rate of mortality or morbidity. In both cases, the IAD Members acknowledged that in some circumstances the absence of such documentary evidence might not preclude a finding of legal validity, but they were not prepared to reach such a conclusion for knee replacement surgery without a greater evidentiary foundation.

[21] In the case at bar, there is some evidence of the actual costs and wait lists associated with the medical officer's prognosis. While the documentation in the Appeal Record does not refer to Canadian average per capita costs, figures relating to knee replacement surgery are provided and the report suggests that these figures are in excess of average costs. And although a link between wait lists and increased mortality and morbidity is not directly addressed, the documentation similarly confirms that adding to the identified wait lists would likely create excessive demand.

[22] It would be preferable that current and precise data regarding average per capita costs be available and that more substantial evidence of the link between the specific wait list delays and

[13] *Sivapatham v. Canada*, (*Minister of Citizenship and Immigration*) (IAD TA3-09144) Whist, November 12, 2004.
[14] *Desai v. Canada*, (*Minister of Citizenship and Immigration*) (IAD TA3-20271) Collison, September 29, 2005.

mortality and morbidity be provided. However, the evidence I do have indicates that, whatever such data indicate, the costs and delays associated with knee replacement surgery and follow-up are in excess of the Canadian per capita five-year average and would increase the rate of mortality and morbidity. No such information appears to have been before the panels in *Sivapatham* or *Desai*.

[23] Ideally, the evidence should demonstrate that the average Canadian per capita health services costs over a period of five consecutive years is "X dollars" and the costs identified for knee replacement surgery over the same period is in excess of "X dollars." That said, and absent any contradictory evidence, I am not prepared to find that there was no evidence before the visa officer with respect to these pertinent questions simply because a precise figure is not identified in the materials. In the circumstances of this case, it is adequate that there is evidence of the likely costs to be incurred by the applicant and the likely impact on wait lists, and a determination that this would result in excessive demand within the meaning of *IRPA*.

[24] Moreover, I agree with my colleagues that in some circumstances the IAD may conclude that excessive demand is made out in the absence of such documentary evidence but disagree with their conclusion that this cannot be done in the case of knee replacement surgery. In *Sivapatham*, Member Whist indicated that he might be prepared to find excessive demand without such evidence in the case of heart or kidney transplants. I would be prepared to make such a finding for any significant invasive surgery that requires post-operative therapy, including knee replacement surgery.

[25] In sum, the medical officer's diagnosis and prognosis is unassailable and there is sufficient evidence to find that the visa officer's determination with respect to excessive demand is reasonable.

[26] I therefore find that the refusal is valid in law.

Analysis — Special Relief

[27] I now turn to a determination of whether special relief is merited in light of all the circumstances of this case. Section 67(1)(c) of *IRPA* reads:

> 67. (1) **Appeal Allowed —** To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,
>
> > (c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

[28] The *Chirwa* case,[15] although decided under the former *Immigration Act*, still provides what has become an enduring definition of humanitarian and compassionate grounds as:

> … those facts, established by the evidence, which would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another - so long as those misfortunes warrant the granting of special relief from the provisions of the Immigration Act.

[29] The factors that are generally applicable in cases of this nature include the following:[16] the relationship of the sponsor to the applicant and its strength; the reasons for the sponsorship; the overall situation of both the sponsor and applicant; family support; the existence of dependency between the sponsor and the applicant; the best interests of any children directly affected by the decision; and the objectives of the Act. These factors are not exhaustive, but they do represent some of the appropriate considerations for evaluating special relief.

[30] In making this determination, I accept the appellant's evidence as credible. She testified in a coherent and compelling manner and Counsel for the Minister did not suggest that her evidence should be disbelieved. As such, it has been established that the appellant and the applicant have a close and loving relationship, the appellant's siblings in India are not willing or able to care for the applicant, the applicant is currently in good health and is able to cook and clean for herself, the applicant has lived alone since the death of her husband, the appellant is desperate to have her mother with her in Canada, and the appellant is unable to spend a lot of time with her mother in India because of the demands of the family businesses in Canada.

[15] *Chirwa* v. *Canada (Minister of Manpower and Immigration)* (1970), 4 I.A.C. 338 (I.A.B.).
[16] *Hundal v. Canada (Minister of Citizenship and Immigration)* (IAD MA6-04401) Paquette, November 30, 2007.

The Barrier to Admission

[31] Protecting Canada's health care system from excessive demand is an important objective of *IRPA* and, generally, there is a high standard to be met when assessing whether special relief is merited in a medical refusal. I note, however, the 2005 IAD decision *Khan*, in which Member Stein held as follows:[17]

> The appellant is not challenging the legal validity of the refusal. Nonetheless, a weakness in the refusal relevant to the exercise of discretionary relief is the absence of any projections as to the specific cost associated with bilateral knee osteoarthritis. Also absent are costs related to the average Canadian *per capita* health services costs referred to in the definition of excessive demand. In light of the evidence as a whole, I find that while the cost associated with osteoarthritis is excessive, it is not inordinate. In my view, where the cost is not inordinate, the factors supporting the exercise of discretionary relief do not need to be as great as where the costs are higher.

[32] I adopt Member Stein's reasoning. In the case at bar, the evidence suggests that the applicant's medical costs would not be inordinate.

[33] I also note that the evidence at the time of hearing indicates that the applicant is now pain free, able to climb stairs and is generally healthy. The appellant testified that the applicant has no plans to undergo surgery and the letter from Dr. Hunjan confirms this. As the refusal is legally valid, I have determined that the applicant might reasonably be expected to cause excessive demand on health services in Canada. While meeting the low threshold of "might reasonably be expected", the evidence before me suggests that it is entirely possible that the applicant will not require surgery. This too is a positive factor that is relevant to the exercise of my discretion.[18]

[34] Thus, because the demand would not be inordinate and the evidence suggests that the applicant may not require surgery at all, the negative weight I give this factor is tempered.

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[17] *Khan v. Canada (Minister of Citizenship and Immigration*) (IAD TA4-08639) Stein, November 1, 2005.
[18] See *Chana v. Canada (Minister of Citizenship and Immigration)* (IAD VA6-01197) Ostrowski, November 16, 2007. In this case, the fact that the appellant's condition had improved and stabilized was considered a positive factor.

Family Ties

[35] Clearly, the reunification of family in Canada is an important objective of *IRPA*[19] and must be taken into account in the balancing of pertinent factors in this appeal. Counsel for the Minister has also reasonably conceded that the bond between the appellant and her mother is close and that the appellant genuinely cares for and worries about her mother. As such, their relationship is a positive factor in this appeal. However, counsel for the Minister also suggests that it is counterweighted by the applicant's family ties in India.

[36] While the appellant's siblings are living in India, I accept her evidence that they do not live near the applicant (her brother is about 90 minutes away and her sister is four hours distance). I also accept the appellant's testimony that her brother does not have a good relationship with the applicant – there has been some sort of longstanding conflict between them – and that her sister is living with her husband's family and cannot assist the applicant due to her marital commitments. The appellant also stated that although the applicant has two older sisters still living, neither is physically healthy and they cannot offer any support.

[37] I also note that the appellant has been providing financial support to her mother and has done so for many years.

[38] In sum, while the applicant has family ties to both India and Canada, her ties to the appellant are clearly strongest. This weighs in favour of the appeal and the existence of other relatives in India does not significantly detract from the weight I accord this factor in the balancing of considerations.

Other Factors

[39] The appellant testified that her biggest concern is that her mother is alone with no one to care for her or assist her. As the oldest child, she feels obligated to assist her mother in any way she can. Her father passed away unexpectedly in the family home and the appellant is worried that something could happen to her mother and no one would know. She is also worried about

[19] Section 3(1)(d) of *IRPA*.

her mother being robbed or assaulted as she lives in an area the appellant feels is somewhat dangerous, although she admitted that her mother has not been victimized to date.

[40] I accept that both the appellant and applicant are experiencing hardship as a result of the immigration refusal and that it would not be reasonable or practical for the appellant to spend more time in India to help her mother. However, I agree with counsel for the Minister that the appellant's concern about generalized crime is not an appropriate consideration, particularly since the applicant has not been victimized.

[41] I also give weight to the appellant and her family's degree of establishment in Canada.[20] The appellant and her husband run two businesses that, from the banking records, appear to be doing well.[21] They have been in Canada for 15 years and appear to have successfully established themselves.

Best Interests of the Child

[42] No evidence was presented to suggest that it would be in the best interests of any child to allow the appeal.

Conclusion

[43] In my view, the balance of relevant considerations supports the exercise of discretion in this case and I conclude that the appellant has established that special relief is warranted.

[44] The relationship of the appellant to the applicant is a strong and important one, the reasons for the sponsorship are compelling, and the overall situation of both the sponsor and applicant weighs in favour of the appeal.

[20] This was considered a relevant factor by the panel in *Sivapatham*, *supra*, note 13, at para. 20.
[21] Exhibit A-2.

NOTICE OF DECISION

The appeal is allowed. The officer's decision to refuse a permanent resident visa is set aside, and the officer must continue to process the application in accordance with the reasons of the Immigration Appeal Division.

"Benjamin R. Dolin"
Benjamin R. Dolin

September 19, 2008
Date