Case Name:

Narayan v. Canada (Minister of Citizenship and Immigration)

Faimun Shah Narayan, appellant, and
Minister of Citizenship and Immigration, respondent

[2008] I.A.D.D. No. 1973

[2008] D.S.A.I. no 1973

No. VA6-01267

Immigration and Refugee Board of Canada
Immigration Appeal Division
Vancouver, British Columbia
Edmonton, Alberta

Panel: Douglas Cochran

Heard: August 28, 2008.
Decision: September 24, 2008.

(20 paras.)

Appearances:

Appellant's Counsel: Brij Mohan.

Minister's Counsel: Zonia Tock.

Sponsorship

Reasons for Decision

1 Faimun Shah NARAYAN (the "appellant") appeals from the decision of a visa officer pursuant

to subsection 38(1) of the *Immigration and Refugee Protection Act* (the "*Act*")[1], not to issue a permanent resident visa to her father, Mahmud Hussasin SHAH (the "applicant"). The refusal is based on the applicant's health condition, described in the June 13, 2006 refusal letter as "Severe Chronic Obstructive Pulmonary Disease", which the visa officer determined might reasonably be expected to cause excessive demand on health or social services in Canada. In addition, the visa officer's notes cite Restrictive Lung Disease as another health condition that led to the refusal.

2 These health determinations derive from a Medical Officer's opinion contained at page 199 of the Record. The narrative portion of the opinion states:

> This 52 year old applicant has severe aortic stenosis and moderate mitral stenosis, along with cardiac enlargement. He has calcific aortic and mitral disease with mild regurgitation. In 1999, he admitted to hospital for congestive cardiac disease. Currently, his is comfortable with ordinary activities but feels breathless and has a dry cough on moderate activities. The cardiologist writes that he is likely to require aortic and mitral valve replacements in the next five years.
>
> It is reasonable to expect that the heart condition of this applicant will progress and deteriorate, requiring ongoing review of his cardiac status and the implementation of a treatment plan to manage his condition. Deterioration could reasonably be expected and would result in repeated visits to the emergency room, hospitalization and a requirement for specialized hospital facilities including intensive and/or cardiac care units and surgical suites for the required heart surgery. These are expensive modalities and in addition, there are waiting lists for the health services required by the applicant which, in turn, could result in displacing Canadians and permanent residents already waitlisted.
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> Based upon my review of the results of this medical examination and all the reports I have received with respect to the applicant's health condition, I conclude that he has a health condition that might reasonably be expected to cause excessive demand on health services. Specifically, this health condition might reasonably be expected to require services, the costs of which would likely exceed the average Canadian per capita cost over 5 years, and would delay or deny the provision of those services to those in Canada who need and are entitled to them.
>
> The applicant is therefore inadmissible under Section 38(1) of the Immigration and Refugee Protection Act.

> Also has: Restrictive Lung Disease.
>
> [Copied from the original without correction]

3 The appellant acknowledged the legal validity of the refusal and sought the panel's exercise of discretion on the basis that, taking into account the best interests of any child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

4 The appellant was sponsored to Canada by her spouse in October 2001. She has one daughter from that relationship. The appellant sponsored her father, mother, two of her sisters and her brother in May 2003. She has one sister with two children, living independently of her family in Fiji. The application to sponsor was refused due to the applicant's health issues in June 2006. The appellant works as a health care aide in Canada and the two sisters whom she is sponsoring are currently working in Canada on two-year temporary work permits.

5 Much of the hearing time was spent with evidence of the applicant's current health condition and the extent to which this impairs his daily functioning. As the appellant has not challenged the medical opinion and the consequent legal validity of the refusal, such evidence is contextual rather than a challenge to the determination of excessive demand. In other words, while acknowledging the excessiveness of the demand, the appellant is entitled to argue that in relative terms, the excessiveness is modest.

6 There is evidence in the Record which is supported in disclosure from the appellant which provides a picture of the impact of the applicant's health condition on his daily life. The Cardiologist treating the applicant, in a letter dated May 10, 2006 stated:

> He has moderately severe aortic stenosis and moderate mitral stenosis with cardiac enlargement. He has recovered from congestive heart failure with associated chest infection and he is vastly improved and feels well without shortness of breath, chest pain, giddiness or cough and he is coping well and normal work at home including gardening, mowing lawn and chopping firewood.
>
> [Copied from the original without correction]

7 The doctor lists the applicant's medication for maintenance of his heart condition and makes the following comment:

> It would appear that his cardio-respiratory difficulties in the past has been due perhaps to inappropriate treatment of wheezing bronchitis and cardiac failure during the last two years and the change of treatment has been remarkable.

> With supervised treatment he will regain and maintain much improved state of health now and into the future. It is considered that maintenance treatment is essential to control his cardiac failure...
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> Finally this man has aortic and mitral valve disease and he has considerably improved with antibiotic and decongestive treatment. He is well and free of chest pain, cough and SOB [shortness of breath] including active physical activities. He will have to be a honest treatment compliant in order to maintain and improve his present state of health including his presently stable cardiac disease. Any deterioration in his condition will be gradual and slow and the event could be well managed medically. Should surgery be indicated it will be an elective procedure that would not pose any unnecessary load on the hospital surgical service or deny the Canadian nationals on their right to priority treatment. It is considered that the valve replacement would conservatively be a medium term need but it is anticipated to be no earlier than five years.

8 I am cognisant that the comments above directed toward the demand on the Canadian medical system have no relevance at this hearing because of the acknowledgment by the appellant, of excessive demand. The other comments however, provide some evidence of the impact this condition has on the applicant. The appellant testified about her father's condition. She has observed his management of this condition in visits to Fiji in 2004, 2005, 2006 and 2008. She described his condition as having dramatically improved. The appellant stated that her father works as a cane truck driver and fisher. He works about 9-10 hours per day, taking one day off in a two week cycle.

9 In considering the humanitarian and compassionate aspect of this appeal, there is little to make this family situation stand out from a multitude of families living separately in two countries. The ties of love and familial obligation are obvious on the evidence before me. I heard from the appellant, her husband, two sisters and the applicant. Clearly, this is a closely knit, loving family where the children and the appellant's spouse have strong feelings of respect, gratitude and obligation towards the applicant and his wife. But that is more often the case than not. From the appellant's perspective, other than her immediate family, she is alone in Canada and the prospect of being separated from her father, mother and sisters in Fiji is heartbreaking. This emotion is exacerbated by the experience she currently has of having her two sisters close to her, since they are in Canada on temporary work visas. The appellant feels a strong obligation toward the applicant as the eldest child, something she described as being "like the eldest son".

10 The appellant testified that her daughter misses her grandparents and I conclude that it would be in this child's best interests to have more ready access to the applicant and his wife. At the same time, the appellant's sister, who will remain in Fiji has two young children who will also miss their

grandparents. The evidence before me is that these children see their grandparents on a daily basis. Notwithstanding that there are two children in Fiji and one in Canada, weighing the best interests of these children is not a simple numbers game. The children in Fiji have had the benefit of regular contact with their grandparents in their early years, while the child in Canada has not. The children in Fiji are likely to continue to have contact with their grandparents similar to the contact that the child in Canada has had over the years. The children in Fiji would materially benefit from support that the applicant testified he would provide their mother when working in Canada. On a very rough scale the best interests of children affected by this decision are equal, should the applicant come to Canada or remain in Fiji.

11 In considering hardship to the applicant and to the appellant there is no extreme hardship in this situation. The appellant travels regularly to Fiji and remains for a long holiday period. The applicant lives a comfortable life on leased land although he earns a small income and works exceptionally hard. He would clearly benefit from medical treatment in Canada but he can receive that medical treatment elsewhere with a cost to himself and his children, a cost that would principally fall on the appellant's shoulders.

12 I accept that the applicant will likely need surgery within the next five years. If he continues to function at his current level he may not but on the whole of the evidence before me, on the balance of probabilities, he will. All of his daughters stated that they want their father to come to Canada so he can have the heart valve surgery. When asked why the applicant has not received the surgery in Fiji, a number of witnesses confirmed that the medical facilities in Fiji are not conducive to the required surgery. When asked why the applicant has not gone to New Zealand or India for the surgery, the evidence from various of the appellant's witnesses was that it is difficult to arrange for a visa and more importantly, the applicant would require family members to be with him for his surgery and recovery thus substantially adding to the cost and practicality of that option. The consistent message from the appellant and her sisters was that they would pay for the surgery in Canada. While this "solution" to their dilemma may appear practical, it has long been determined to be contrary to the principles of universal access to medical treatment for citizens and landed immigrants and contrary to public policy.

13 I have no doubt that the appellant, her husband and her sisters would pay for treatment for her father if required, however I find that they have not thoroughly explored that option or pursued treatment outside of Canada because the preferred option is to utilize the Canadian health care system.

14 In assessing the humanitarian and compassionate aspects of this appeal I draw guidance from the decision in *Jugpall*[2]. Although this case dealt with financial disqualification, in considering the weighing process in humanitarian and compassionate assessments it drew upon the example of the exercise of compassion in medical inadmissibility cases.

> A simple example illustrates the point: if one applicant is inadmissible to Canada

> because he has a relatively minor, treatable medical condition and another applicant is inadmissible because he has chronic kidney disease, has experienced renal failure and requires dialysis for the rest of his life, then both applicants are equally inadmissible. From the point of view of the law, they are similarly inadmissible. However, when the potential burden on health services of allowing the first applicant into Canada is compared with the potential burden of allowing the second applicant to enter Canada, it is evident that the two applicants are not in the same position. In order to succeed on appeal, both applicants need to show that there are compassionate and humanitarian grounds that warrant the granting of special relief, but the second applicant needs to bring forward a considerably more compelling case than the first applicant, given the nature of his condition[3].

15 To allow all appeals on the basis that everyone deserves compassion would render the process meaningless, as would denying all appeals on the basis that no amount of suffering is enough to overcome the obstacle. The process of weighing humanitarian and compassionate relief draws meaning from a balancing of the degree of the impediment against the degree of the suffering that inspires the compassion.

16 Applying the *Jugpall* reasoning to the present medical refusal/excessive demand scenario, where the demand is modestly excessive then only modest humanitarian and compassionate circumstances are required in order for the appellant to succeed. Excessive demand is defined at page 217 in the Record:

> "Excessive demand" means
>
> (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 medical examination, unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is not more than 10 consecutive years; or
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> (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 of or delay in the provision of those services to Canadian citizens or permanent residents.

17 I did not find a quantification of the "average Canadian per capita health services and social services costs" in the Record and none was presented by the Minister in evidence before me. I note that in other decisions from the Immigration Appeal Division (the "IAD") costs have been quantified by the Minister in establishing the degree of excessive demand and where the demand proven at the hearing is less than those costs the medical refusal has been found not to be legally

valid[4]. As the legal validity of the visa officer's refusal has not been challenged by the appellant I will not turn my attention to the appellant's quantification of costs for the purpose of considering the legal validity but solely for the purpose of considering the relative degree of excessiveness.

18 Given the evidence before me, if the demand on medical services were very high the appellant could not succeed. The humanitarian and compassionate aspects of the appellant's circumstances are not strongly compelling. The appellant has provided evidence in the form of a letter from the applicant in the Record which places the cost of valve replacement surgery at approximately $10,000 (Cdn). In testimony the appellant's husband placed the cost at approximately $7,000. Minister's counsel has not provided evidence to contradict these numbers and did not challenge the appellant's quantification in submissions.

19 Based on the only quantification of cost that is before me I find that the demand on health and social services presented by the applicant's medical condition is relatively modest. I weigh this demand against the strong ties of love and affection between the appellant, her parents and siblings as credibly testified to by the appellant. In addition, I give some weight to the appellant's obligation toward the applicant as the eldest child and the fact that she will remain at a considerable distance from her sponsored family if they are not permitted to come to Canada. I ascribe a little weight to the economic hardship incurred by the appellant in traveling annually to Fiji in order to maintain her relationship with her family, including maintaining contact between her daughter and her parents and sisters, in Fiji. I ascribe some, but little weight to the hardship experienced by the applicant in Fiji, although the demands of his substantial working regime in Fiji will undoubtedly take a greater toll as he ages.

20 On the balance of probabilities, the appellant has established, by a slim margin, taking into account the best interests of any child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case. The appeal is allowed.

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.

"Douglas Cochran"

24 September 2008

cp/e/qlspt

1 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

2 *Jugpall, Sukhjeewa Singh v. M.C.I.* (IAD T98-00716), Aterman, Goodman, Townshend, April 12, 1999.

3 *Ibid.*

4 *Bhawal v. Canada (Minister of Citizenship and Immigration)* (I.A.D. MA2-09523), Fortin, April 6, 2004.