

Federal Court



Cour fédérale

**Date: 20150408**

**Docket: IMM-6531-14**

**Citation: 2015 FC 422**

**Montréal, Quebec, April 8, 2015**

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

**BETWEEN:**

**KATHY MAE MARTIN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Preface

[1] This is a case onto itself. The very serious nature of the applicant's employer's child's medical situation requires continuous care and supervision in respect of diet and medication; that includes assistance in administering insulin, and constant monitoring of blood sugar levels for a severe diabetic condition; this is clearly demonstrated by uncontradicted evidence of the existence of critical medical episodes in the child's past.

[2] The relationship of mutual devotion, dedication and affection developed over the years between the child and the applicant and that of the employer's family must be taken into wholesome consideration, especially acknowledging the credibility of the evidence that demonstrates most importantly, the applicant's significant role in the child's well-being.

[3] The applicant has, as per the evidence, won the child's complete trust. Acknowledging the child's adolescent age, the relationship of confidence that has been built between the applicant and the child allows for the preservation and maintenance of the child's well-being, recognizing that the fragility of the child is foremost in the applicant's understanding.

[4] As per the evidence, the fact that the child's parents own their own business and, therefore, are often absent from home was not given adequate consideration in context, despite clear point specific indication in letters from medical doctors outlining that the child has had medically specified serious critical episodes due to her condition. Therefore, it appears incumbent in this particular case that due attention and consideration be given to the comprehensive evidence. This is to ensure that the child's health and life is not placed in jeopardy. Inherent circumstances warrant, due to "compelling reasons", an exception, to be applied in the case of the applicant, as has been shown in relevant jurisprudence outlined below.

## II. Introduction

[5] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision by an Immigration Officer

[Officer] dated August 26, 2014, in which the Applicant's application for a temporary resident permit [TRP] pursuant to subsection 24(1) was refused.

### III. Factual Background

[6] The Applicant is a citizen of Philippines who entered Canada on July 18, 2009, under a Live-in Caregiver Program permit. The Applicant was authorized to remain in Canada until August 3, 2013.

[7] The Applicant is the caregiver for her employer's 14-year-old insulin-dependent daughter, who suffers from Type 1 diabetes.

[8] On May 8, 2014, the Applicant's application for restoration of her temporary residence status was rejected under Rule 182 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, on the basis that it was submitted more than 90 days after the expiry of the Applicant's temporary residence status (Certified Tribunal Record, at p 71).

[9] On or around June 23, 2014, the Applicant filed an application for a TRP (Certified Tribunal Record, at p 84).

[10] In support of her TRP application, the Applicant provided the following submissions:

- i. The Applicant was late in filing an application for renewal of the Live-in Caregiver work permit because she was waiting for her Quebec Selection Certificate [QSC] to

be issued. The Applicant did not benefit from legal counsel and was therefore unaware of the timeline for renewing her work permit.

- ii. The best interests of her employer's 14-year-old child, who is diabetic, requires the Applicant's direct care and supervision for her diet and medication.

(Certified Tribunal Record, at pp 81-84)

#### IV. Impugned Decision

[11] In a letter dated August 26, 2014, the Officer rejected the Applicant's TRP application on the basis of insufficient grounds to justify the issuance of a TRP (Certified Tribunal Record, at pp 20 and 40).

#### V. Legislative Provisions

[12] Section 24 of the IRPA provides as follows:

**Temporary resident permit**

24. (1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.

**Exception**

(2) A foreign national referred to in subsection (1) to whom an officer issues a temporary resident permit outside Canada does not become a temporary

**Permis de séjour temporaire**

24. (1) Devient résident temporaire l'étranger, dont l'agent estime qu'il est interdit de territoire ou ne se conforme pas à la présente loi, à qui il délivre, s'il estime que les circonstances le justifient, un permis de séjour temporaire — titre révocable en tout temps.

**Cas particulier**

(2) L'étranger visé au paragraphe (1) à qui l'agent délivre hors du Canada un permis de séjour temporaire ne devient résident temporaire

resident until they have been examined upon arrival in Canada.

qu'après s'être soumis au contrôle à son arrivée au Canada.

**Instructions of Minister**

(3) In applying subsection (1), the officer shall act in accordance with any instructions that the Minister may make.

**Instructions**

(3) L'agent est tenu de se conformer aux instructions que le ministre peut donner pour l'application du paragraphe (1).

VI. Issues

[13] The Applicant submits the following issue:

Did the Officer fetter his discretion, act without regard to the evidence, or fail to provide sufficient reasons for denying the Applicant's TRP?

[14] The Court considers the determinative issue to be whether the Officer's decision is unreasonable or made without regard to the evidence.

VII. Position of the Parties

A. *Applicant's Position*

[15] First, the Applicant argues that the Officer unduly fettered his discretion in rendering a negative decision without regard to the Applicant's submissions and documentary evidence provided in support of her TRP application.

[16] Second, relying upon *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 and *Hawthorne v Canada (Minister of Citizenship and Immigration)*, [2002] FCJ 1687, the Applicant contends that in the exercise of his discretion, the Officer failed to consider and evaluate the best interest of the Applicant's employer's child, for whom the Applicant is a caregiver.

[17] Moreover, the Applicant submits that flexibility is required for caregivers, in accordance with the jurisprudence and Canada's international obligations such as the *UN Convention on the Rights of the Child*, 1577 UNTS 3, Can TS 1992 No. 3.

[18] Third, the Applicant submits that the *Citizenship and Immigration Canada Inland Processing Manual IP-1: Temporary Resident Permits Operational Manual* [CIC Manual] requires the Officer to consider, among others, the following factors, which the Officer failed to examine:

- Job qualifications;
- Economic contributions;
- Protecting public health;
- The tangible and intangible benefits which may accrue to the person concerned and to others.

[19] Finally, the Applicant argues that the Officer's reasons are inadequate.

B. *Respondent's Position*

[20] First, the Respondent submits that it was not unreasonable for the Officer to conclude to the absence of exceptional circumstances in the context of the Applicant's TRP application. Moreover, the Respondent submits that the Applicant mistakenly conflates the analysis for an H&C application under section 25 of the IRPA, which is materially distinguishable from an analysis under section 24.

[21] Second, the Respondent argues that the Applicant's employer's 14-year-old child's best interest does not inescapably lead to the conclusion that the Applicant should remain in Canada. The child is under the care and supervision of her parents and there is no evidence to establish that there is no possibility of alternative care arrangements or resources available to her under the Canadian health care system. Therefore, it was not an error for the Officer to consider, on the basis of the evidence provided, that the interests of the child do not amount to "compelling reasons" as contemplated under section 24 of the IRPA.

[22] Third, the Applicant cannot seek to have the Officer's decision set aside on the basis of insufficient reasons. Not only has the Applicant failed to request additional reasons from the Officer but a more detailed written analysis was not required in the context of a TRP application.

VIII. Analysis

A. *Standard of Review*

[23] The highly discretionary and exceptional nature of the issuance of a TRP requires considerable deference from this Court towards the Officer's decision (*Shabdeen v Canada (Minister of Citizenship and Immigration)*, 2014 FC 303 at para 13 [*Shabdeen*]; *Alvarez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 667 at para 18 [*Alvarez*]; *Ali v Canada (Minister of Citizenship and Immigration)*, [2008] FCJ 985 at para 9 [*Ali*]).

[24] As such, cognizant of the Applicant's submission that the standard applicable to the Officer's failure to exercise his jurisdiction is correctness, the Court finds that in accordance with the jurisprudence, the relevant standard is that of reasonableness (*Betesh v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1374 at para 23; *Ali*, above at para 9; *Shabdeen*, above at para 13).

B. *Legislative and Jurisprudential Framework*

[25] Paragraph 24(1) of the IRPA provides a discretionary exemption in issuing permits to foreign nationals who are otherwise inadmissible or do not meet the requirements of the IRPA. This Court has advised that such permits should therefore be issued cautiously (*Farhat v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1275 at para 24 [*Farhat*]; *Alvarez*, above at para 16).



[26] The language of paragraph 24(1) provides that an immigration officer must determine whether it is “justified in the circumstances” to issue a TRP under this provision. The jurisprudence has interpreted “circumstances” to mean the “relevant circumstances” (*Ali*, above at para 12).

[27] The CIC Manual contains Ministerial directions to CIC staff in issuing a TRP under section 24 of the IRPA. Notably, paragraph 5.1 of the CIC Manual provides guidance in regard to interpreting section 24(1) of the IRPA:

Normally, persons who do not meet the requirements of the *Immigration and Refugee Protection Act* are refused permanent resident or temporary resident visas abroad, denied entry at a port of entry, or refused processing within Canada. However, in some cases, there may be compelling reasons for an officer to issue a temporary resident permit to allow a person who does not meet the requirements of the Act to enter or remain in Canada.

[Emphasis added.]

[28] Furthermore, paragraph 12.1 of the CIC Manual describes a series of non-exhaustive “needs and risks factors” which are to be considered by an officer on a case-by-case basis in issuing a TRP under paragraph 24(1) of the IRPA (see: *Farhat*, above at para 22). This Court has found that CIC Manual does not have the force of law (*Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at paras 52 and 53; *Farhat*, above at para 28; *Shabdeen*, above at paras 15 and 16; *Afridi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 193 at para 18).

### **12.1 Needs assessment**

An inadmissible person’s need to enter or remain in Canada must be compelling and sufficient enough to overcome the health or

safety risks to Canadian society. The degree of need is relative to the type of case.

The following includes points and examples that are not exhaustive, but they illustrate the scope and spirit in which discretion to issue a permit is to be applied.

**Officers must consider:**

- the factors that make the person's presence in Canada necessary (e.g., family ties, job qualifications, economic contribution, temporary attendance at an event);
- the intention of the legislation (e.g., protecting public health or the health care system).

**The assessment may involve:**

- the essential purpose of the person's presence in Canada;
- the type/class of application and pertinent family composition, both in the home country and in Canada;
- if medical treatment is involved, whether or not the treatment is reasonably available in Canada or elsewhere (comments on the relative costs/accessibility may be helpful), and anticipated effectiveness of treatment;
- the tangible or intangible benefits which may accrue to the person concerned and to others; and
- the identity of the sponsor (in a foreign national case) or host or employer (in a temporary resident case).

*C. Reasonableness of the Officer's Decision*

[29] Upon review of the Officer's Global Case Management System [GCMS] notes, which form part of the Officer's reasons, it is clear that the Officer considered the following factors:

- The Applicant entered Canada in July 2009 under the Live-in Caregiver Program and has remained in Canada beyond the expiry date of her temporary resident status;

- The Applicant's request for restoration was denied under Rule 182 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR];
- The Applicant did not benefit from legal counsel and was unaware of the limitation periods for renewing her work permit;
- The Applicant raised the best interests of her employer's child, who has diabetes and requires supervision for her diet and medication;
- The Applicant's previous work permit advised her that she was potentially eligible to apply for permanent residence and indicated the website for more details;

(Officer's GCMS notes dated August 26, 2014, Certified Tribunal Record, at p 20).

[30] The Court is not satisfied that the Officer's decision was made with regard to the evidence and applicable factors, as a whole. As asserted in this Court's jurisprudence, the evaluation of whether the Applicant has a compelling need to enter or remain in Canada is at the heart of the TRP analysis (*Shabdeen*, above at para 23; *Farhat*, above at para 22).

[31] The serious nature of the Applicant's employer's child's medical condition, which requires continual care and supervision in respect of diet and medication, assistance in administering insulin, and constant monitoring of blood sugar levels, the relationship of mutual trust, dedication and affection developed over the years between the Applicant and her employer's family, and the Applicant's significant role in the child's well-being, including the fact that the child's parents own their own business and are therefore often absent from home, were not given full consideration (Medical letters from Drs Laurent Legault and Henry

Coopersmith, and letter from Ms. Baroudi-Bedros, Certified Tribunal Record, at pp 73, 75 and 76).

[32] These factors point to the tangible and intangible benefits that make the Applicant's presence in Canada necessary, and fall within the "scope and spirit in which discretion to issue a permit is to be applied" outlined in the CIC Manual.

[33] As stated by this Court, the purpose of a TRP is to "soften the sometimes harsh consequences of the strict application of IRPA which surfaces in cases where there may be "compelling reasons" to allow a foreign national to enter or remain in Canada despite inadmissibility or non-compliance with IRPA" (*Farhat*, above at para 22). It is this Court's view that such a "compelling reasons" analysis cannot be reasonably undertaken without full considerations of the above-mentioned factors.

#### IX. Conclusion

[34] In light of the foregoing, the Application is allowed and sent back before another immigration officer for redetermination.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is granted.

There is no serious question of general importance to be certified.

“Michel M.J. Shore”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-6531-14

**STYLE OF CAUSE:** KATHY MAE MARTIN v THE MINISTER OF  
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