Federal Court  Cour fédérale

**Date: 20120127**

**Docket: IMM-2940-11**

**Citation: 2012 FC 112**

**Ottawa, Ontario, January 27, 2012**

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

**BETWEEN:**

**NOLY DELA ROSA MERCADO**
**CRISTINA TOLENTINO MERCADO**
**NORMAN CHRISTOPHER TOLENTINO MERCADO**
**NATHANIEL TOLENTINO MERCADO**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] The principal applicant, Mr. Noly Dela Rosa Mercado, is originally from the Philippines. He has three children: one is a citizen of Australia (Norman), another of the United States (Nathaniel) and the third (Nicolai) is a citizen of Canada. Two of these children and the applicant's wife, who is also a citizen of the Philippines, were dependent claimants. Two of the children have an allergy to peanuts, Nicolai and Nathaniel. It was advanced before the Pre-Removal Risk

Assessment (PRRA) Officer that this allergy could not be adequately managed in the Philippines and hence they would face undue and disproportionate hardship if required to apply for status from outside of Canada.

[2] The applicant and his family made numerous attempts to regularize their status in Canada. Each of these attempts failed and removal was scheduled for April 7, 2011. A judge of this Court granted a stay of removal on April 4, 2011, pending judicial review of the decision not to defer removal and review of the negative Humanitarian and Compassionate (H&C) decision. In *Noly Dela Rosa Mercado et al v The Minister of Citizenship and Immigration*, 2011 FC 1492 I held that the application for judicial review of the refusal to defer removal was moot.

[3] The remaining issue between the parties is whether the decision of the H&C Officer to refuse the applicants' application for permanent residency under section 25 of the *Immigration and Refugee Protection Act*, 2001, c. 27 (*IRPA*) withstands scrutiny on the standard of review of reasonableness expressed in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

***Analysis***

[4] The applicants' argument is predicated on two alleged errors by the H&C Officer: that the Officer erred in rejecting the applicants' doctor's medical opinion without consulting the Immigration Medical Officer (IMO) and second, that the Officer erred in ignoring the applicants' evidence that the likelihood of accidental exposure to peanuts is greater in the Philippines than it is in Canada. For reasons that follow, both of these arguments fail and the application is dismissed.

***No obligation to refer to the IMO***

[5] It is well-settled that the grant of an H&C application is reserved for exceptional cases. As well, given the highly discretionary element in an H&C decision, significant deference is afforded by this Court to the decision and a wider scope of possible reasonable outcomes may be present: *Jurado Tobar v Canada (Citizenship and Immigration)*, 2011 FC 1111; *Inneh v Canada (Citizenship and Immigration)*, 2009 FC 108 at para 13; *Del Melo Gomes v Canada (Citizenship and Immigration)*, 2009 FC 98 at para 9. To succeed on judicial review, an applicant must demonstrate that the officer either ignored or misconstrued evidence, or made a reviewable error in the analysis of factors relevant to the discretion.

[6] In essence, the applicant's argument is that the decision is, on its face, unreasonable as H&C officers are not trained medical doctors and, as such, when faced with complex medical materials it is incumbent upon them to refer to Canadian Immigration Medical Officers who are there for that purpose.

[7] In this case, the H&C Officer was facing neither a question of diagnosis nor of treatment. It was common ground that the rapid injection of epinephrine was the prescribed treatment, either by an ampoule and syringe or by an EpiPen. The question facing the H&C Officer was, as between these two well understood medical procedures for delivery of the treatment (administration by syringe or EpiPen) the applicants would face undue or disproportionate hardship in being required to use the less preferable treatment.

[8] In sum, the applicants contend that it was a reviewable error for the H&C Officer to find, without the benefit of advice from an IMO, that treating a peanut allergy with the ampoule/syringe form was an acceptable method to manage the medical risk. The H&C Officer conducted a thorough examination of the relative merits of each method:

> The applicants contend that it is particularly dangerous for the children to reside in the Philippines as EpiPen, an epinephrine auto-injector, is not available in that country. (Epinephrine is "the drug of choice" to treat anaphylaxis.) The advantage of the EpiPen is that it allows for self-administration of a pre-measured dose of epinephrine. The evidence presented by the applicants suggests that, in the Philippines, epinephrine is instead available in ampoule form. Counsel submits that the children are too young to be taught to be use [sic] an ampoule, syringe and needle and that studies have shown that training parents to do so "was not very productive". Specifically, the study notes that parents were less accurate in drawing up a dose than medical professionals and that the parents "had many concerns about successfully preparing and administering a dose by this method".
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> While counsel describes utilizing an ampoule, syringe and needle as "1800's approach to medicine", the evidence before me would suggest that this method is still used by medical professionals in order to ensure a more accurate dosage for the particular weight of a patient. (The EpiPen is only available in two pre-measured doses.)
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> […]
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> According to information provided by the applicants, tourists are allowed to bring prescribed medication to the Philippines if they "bring a letter from their physician stating the condition for which they are receiving treatment and the dosage". It seems reasonable, therefore, that the applicants, as returning citizens, would be able to return to Philippines with whatever number of EpiPens their physician recommends for the family to have on hand at home and that these could be carried by the children in the Philippines. In this regard, it is important to note that epinephrine is not a medication that one would take on a daily basis, but rather is prescribed as a precaution in the event of a "life- threatening allergic reaction". I have no information before me as to how often or, indeed, if ever the children have required an injection of epinephrine or, more specifically, have used an EpiPen. A letter from the school principal indicates that once Nathaniel had what she describes as a "severe

> anaphylactic [sic] reaction" in the school and, on that occasion, he [sic] assisted by paramedics. There is no mention that either Nathaniel himself or a member of staff administered epinephrine using the EpiPen.

[9] The H&C Officer's reasons reflect both common knowledge and common sense. In other words, one need not be a medical expert to comprehend the relative differences between administration of epinephrine via an ampoule and syringe and via an EpiPen. There would be little, if any, value added to the exercise of discretion by an IMO medical report. In any event, the H&C Officer approached the issue on the basis that the EpiPen had advantages in its portability and ease of administration, particularly with children.

[10] Counsel for the applicants relies on *Patel v Canada (Minister of Citizenship & Immigration)*, 2005 FC 1055, for the argument that where the H&C Officer had obtained an opinion from the IMO, the H&C Officer erred by failing to address all of the concerns raised in the applicants' evidence from their own medical doctors. Here, and unlike *Patel*, the H&C Officer did not rely on any medical evidence to the exclusion of any other evidence provided either by the applicants or by an IMO. In fact, the Officer framed his assessment of the H&C factors on the basis of the applicants' own medical evidence:

> The applicants have not provided a doctor's letter or other medical documents regarding Nathaniel. It is, therefore, difficult to gauge the severity of his condition or how it has, in the past, or would, in the future, affect him. As for Nicolai according to a July 2010 letter from his pediatrician, Dr. Tse, he has a "severe allergy to peanuts", which "can be life-threatening without proper precautions". He further states that his condition "requires close monitoring and treatment".

[11] The letter from the applicants' physician stated that the applicants' children's allergy to peanuts "can be life-threatening without proper precautions." All that this means is that absent the

proper precautions, i.e. having either an ampoule, syringe or an EpiPen on hand in the case of exposure to peanuts, the peanut allergy *can be* life threatening. The evidence does not say or imply that not having an EpiPen *is* life-threatening. Dr. Tse's letter simply states: "Nicolai will have to avoid peanuts and to have with him an EpiPen for emergencies."

[12] In light of the evidence before the H&C Officer that the ampoule, syringe and needle method is still used by medical professionals to deliver epinephrine, there is nothing in Dr. Tse's letter or in the record to suggest that the ampoule, syringe and needle form of delivering epinephrine is any less effective and life-saving than an EpiPen in the case of an anaphylactic reaction. An EipPen is admittedly more convenient and may require less time (measured in seconds) to administer, but that does not mean that the alternative is so unacceptable as to constitute unusual or underserved hardship within the meaning of section 25 of the *IRPA*, as the Officer reasonably found.

[13] The applicants also contend that the H&C Officer neglected to consider Nicolai's peanut allergy with respect to his asthma. Counsel submits that "had the Officer consulted a Medical Officer, the Officer probably would have been alerted to the fact that the existence of asthma creates a very strong comorbidity to anaphylaxis."

[14] Evidence of comorbidity, not just asthma and peanut allergy, was not specifically mentioned in the medical documentation in the record and was not before the H&C Officer such that the Officer failed to consider it. With respect to asthma, the H&C Officer wrote:

> Dr Tse also notes that Nicolai "developed" asthma in the six months prior to the writing of his July 2010 letter. In that time period, he

> required treatment at the hospital on three occasions. The applicants have submitted two discharge sheets from the Sick Kids Hospital from March 2010, which indicate that the child was diagnosed with "[r]eactive airways disease — possible asthma" and "left sided pneumonia" and that he was given two prescriptions including one for an inhaler. A note from Dr Tse written that same month indicates that the child was suffering from bronchitis. This would suggest that his hospitalization was not due solely to his asthma. Asthma is not an uncommon ailment and the applicants have not submitted that the necessary treatment or medication is unavailable in the Philippines. Although the applicants may prefer to remain in Canada under the care of their current family physician, they have provided little evidence to demonstrate that, in the Philippines, Nicolai would not have access to whatever medical care he might require for his asthma.

[15] Absent any evidence which the H&C Officer failed to consider, there is no suggestion on the record that the combination of asthma and peanut allergy have a comorbidity which would make the decision unreasonable or to establish arguable grounds of undue hardship. In any event, it is difficult to see how postulating scenarios with adverse medical outcomes advances the applicants' position as the H&C Officer approaches the decision on the basis that a peanut allergy, in and of itself was life-threatening.

[16] In sum, the H&C Officer did not err in making the decision on H&C factors without of the benefit of the opinion of an IMO. He was not required to consult an IMO where what was involved was neither the diagnosis or management of a complex medical condition, but rather the practical implications associated with two different but widely known and acceptable methods of management of a known condition.

***The H&C Officer did not err in respect of the likelihood that accidental exposure to peanuts was greater in the Philippines than it was in Canada because the Officer did not ignore evidence***

[17] The applicants submit that the H&C Officer erred in ignoring the evidence which demonstrated that the likelihood of an unintentional peanut exposure was greater in the Philippines than it was in Canada. The applicants' argument devolves to a disagreement over the weight given to the evidence by the H&C Officer. The H&C Officer accepted that peanuts are abundantly available in the Philippines. The Officer also accepted that food labeling requirements may be less strict in the Philippines. He further assessed the relative degree of social awareness between Canada and the Philippines with respect to peanut allergy. It cannot be said that the Officer committed a reviewable error by finding that the likelihood of an unintentional peanut exposure was no greater in the Philippines than it was in Canada. The H&C Officer did not ignore evidence in making such a finding.

[18] The appropriate test for an officer of Citizenship and Immigration Canada adjudicating an H&C application is whether the applicant would suffer an unusual, undeserved or disproportionate hardship by being forced to apply for permanent residency outside of Canada. The reasons provided by the H&C Officer reasonably demonstrate that no such hardships will be suffered and the decision remains within the range of possible, acceptable outcomes defensible in light of the facts and law and is therefore reasonable.

[19] The application for judicial review is dismissed.

[20] There is no question for certification.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review be and is hereby dismissed. No question for certification has been proposed and none arises.

"Donald J. Rennie"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-2940-11 |
| **STYLE OF CAUSE:** | NOLY DELA ROSA MERCADO, CRISTINA TOLENTINO MERCADO, NORMAN CHRISTOPHER TOLENTINO MERCADO, NATHANIEL TOLENTINO MERCADO v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Toronto |
| **DATE OF HEARING:** | December 8, 2011 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | RENNIE J. |
| **DATED:** | January 27, 2012 |

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