Federal Court Cour fédérale

Date: 20160420

Docket: IMM-4335-15

Citation: 2016 FC 438

Ottawa, Ontario, April 20, 2016

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

RENATA MUZEKA-HARASIM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant seeks judicial review of a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board upholding an immigration officer's decision to deny permanent resident visas to her parents. The officer denied the visas after finding that the applicant's father was medically inadmissible to Canada.

[2] On January 17, 2007, the applicant sponsored her parents. On May 16, 2011, an immigration officer informed the parents that a medical officer had diagnosed the father with a heart condition that might reasonably be expected to cause excessive demand on health services, thereby triggering the father's medical inadmissibility under paragraph 38(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The officer also noted that the mother may be inadmissible under paragraph 42(1)(a) of the Act due to the father's inadmissibility. The officer stated that:

> Before I make my final decision, you may submit additional information or documents relating to the above medical condition, diagnosis or opinion. You may also submit any information addressing the issue of excessive demand if it applies to your case.

[3] On March 25, 2013, a different immigration officer informed the parents that they may not meet the requirements to immigrate to Canada because the father had been diagnosed with Ischemic Cardiomyopathy. The letter described this condition as:

> [A] common and largely irreversible form of heart muscle disease and cause of the clinical syndrome of chronic heart failure. Chronic heart failure is a pathological state in which the heart, via an abnormality of the cardiac function, fails to pump blood at a rate commensurate with the body tissues requirements. This is a chronic, progressive condition and its natural course is of clinical deterioration causing circulatory failure and leading to severe organ disorder and insufficiency.

The letter concluded that:

> If admitted to Canada, [the father] will likely continue to require regular cardiologist review and follow-up and will likely require repeated hospital admissions for further investigations and treatment to deal with anticipated episodes of exacerbation of the heart failure. In addition, he will likely be placed on a cardiac transplant waiting list and receive a heart transplant. Based upon a review of the results of this client's immigration medical

> examination and all reports received with respect to this individual's health condition, I conclude that this client has a health condition (Ischemic Cardiomyopathy) that might reasonably be expected to cause excessive demand on Canadian health services.
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> …
>
> In view of the above mentioned health related service requirements, admission of this client will likely create an excessive demand on Canadian health services (on both cost and displacement basis) making him inadmissible under section 38(1)(c) of the *Immigration and Refugee Protection Act*.

[4] Once again, the officer provided the parents with an opportunity to submit additional information prior to a final decision. This additional information was received on August 12, 2013, and on September 19, 2013, the parents received a letter from a medical officer entitled "procedural fairness." The letter acknowledged receipt of several documents from the parents, including documents related to the father's heart condition. The medical officer stated that "[i]t is my opinion that the new material does not modify the assessment of medical inadmissibility."

[5] On September 30, 2013, the parents received a letter finding the father to be medically inadmissible to Canada on account of his Ischemic Cardiomyopathy. The mother was found inadmissible on account of the father's inadmissibility. Due to their inadmissibility, the parents' visas were denied, pursuant to subsection 11(1) of the Act.

[6] The IAD upheld the officer's decision. It held that the test for medical inadmissibility under paragraph 38(1)(c) of the Act is whether the applicant's health condition might reasonably be expected to cause excessive demand on health or social services. The IAD emphasized that "[t]he operative word in paragraph 38(1)(c) of IRPA is ***might*** reasonably be expected to cause

excessive demand on health or social services **not** ***will*** or ***would*** cause excessive demand" [emphasis in the original].

[7] The IAD applied this test to the medical evidence before it, including new evidence contained within a letter from Dr. Michael McDonald, dated May 8, 2014. In his letter, Dr. McDonald states that:

> Based on the medical records available, there is no suggestion of a manifest heart failure syndrome. [The father] would be best characterized as having structural heart disease without heart failure, also known as American Heart Association Stage B disease. This distinction is critical because it relates to prognosis. Patients with stage B disease are at lower risk of death and hospitalization than patients with persistent heart failure symptoms (known as stage C disease). I would also question the diagnosis of ischemic cardiomyopathy in this case. His angiogram did not show a significant burden of coronary artery disease and he only required one vessel to be bypassed at the time of his valve surgery.

[8] The IAD gave little weight to Dr. McDonald's alternative medical assessment for three reasons. First, it held that Dr. McDonald applied the wrong test for medical inadmissibility when he wrote that "I have been asked to provide an opinion regarding [the father's] cardiovascular condition and specifically comment on whether this individual **would** create excessive demand on Canadian health services" [emphasis in IAD Decision]. As noted above, the IAD held that the correct test is whether the father's condition **might** reasonably be expected to create excessive demand. Second, the IAD held that, in any case, it was not qualified, or permitted, to depart from the medical officer's diagnosis regarding the father's condition. Finally, while the IAD was permitted to review whether the father's condition would impose an excessive demand

on Canadian health and social services, Dr. McDonald's letter failed to adequately address this issue.

[9] After considering the rest of the evidence, the IAD concluded that the officer's decision was correct. It held that the medical officer's opinion, upon which the officer's decision was based, was the "most complete and comprehensive with respect to the ground of refusal and inadmissibility and that the applicant's current medical condition might reasonably be expected to cause excessive demand on health and social services."

[10] Finally, the IAD held that there were not sufficient humanitarian and compassionate grounds to warrant granting the parents permanent residence, notwithstanding their inadmissibility. The IAD acknowledged that the applicant is financially well-off and that she offered to cover the costs of her father's treatment. However, it noted that such a promise is unenforceable. The IAD also acknowledged that, save for one of the mother's brothers, the parents had no close family in Bosnia. However, it held that the parents did have neighbours and friends in Bosnia, and were relatively close to their siblings, despite not living close together. Finally, the IAD considered the impact on the applicant's children (the parents' grandchildren) of denying the parents permanent residence. The IAD concluded that, although the parents were close with their grandchildren, they would be able to visit and speak with them often, even if they were prevented from moving to Canada.

[11] The applicant submits that the IAD misapplied the test for medical inadmissibility, and mischaracterized its role in reviewing new medical evidence. Both of these issues relate to the new medical evidence provided in the letter from Dr. McDonald.

[12] The applicant claims that these issues should be reviewed on a standard of correctness. However, in my view, they both involve questions of mixed fact and law and/or turn on the interpretation of the IAD's home statute. They should therefore be reviewed on a standard of reasonableness: *British Columbia (Securities Commission) v McLean*, 2013 SCC 67, [2013] 3 SCR 895 at para 21.

[13] The applicant urges the Court to find that the IAD erred when it faulted Dr. McDonald for stating in his letter that "I have been asked to provide an opinion regarding [the father's] cardiovascular condition and specifically comment on whether this individual **would** create excessive demand on Canadian health services."

[14] The IAD draws a distinction between the phrases "would cause excessive demand" and "might reasonably be expected to cause excessive demand," and faults Dr. McDonald for applying the "would cause" test, rather than the "might reasonably be expected to cause" test. However, as the Supreme Court held in *Hilewitz v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 SCR 706 at para 58-60 [*Hilewitz*] , this is a distinction without a difference. *Hilewitz* was decided pursuant to section 19(1)(a)(ii) of the *Immigration Act*, which denied admission to any person whose health condition "would cause or might reasonably be expected to cause excessive demands on health or social services" [emphasis

added]. However, the Court also explicitly considered the language in paragraph 38(1)(c) of the (then) newly enacted *Immigration and Refugee Protection Act*:

> The clear legislative threshold [under section 19(1)(a)(ii) of the *Immigration Act*] provides that to be denied admission, the individual's medical condition "would" or "might reasonably be expected" to result in an excessive public burden. The threshold is reasonable probability, not remote possibility. It should be more likely than not, based on a family's circumstances, that the contingencies will materialize. See *Hiramen v. Minister of Employment and Immigration* (1986), 65 N.R. 67 (F.C.A.), and *Badwal v. Canada (Minister of Employment and Immigration)* (1989), 64 D.L.R. (4th) 561 (F.C.A.), both by MacGuigan J.A. The same analysis is applicable to the new *Immigration and Refugee Protection Act*, which replaced most of the *Immigration Act*, including s. 19. Medical inadmissibility, as previously stated, is now determined under s. 38(1)(c) of the *Immigration and Refugee Protection Act*, which states:
>
> > 38. (1) A foreign national is inadmissible on health grounds if their health condition
> >
> > …
> >
> > (c) might reasonably be expected to cause excessive demand on health or social services.
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> Under this new provision, health impairments need no longer be those that "would cause or might reasonably be expected to cause" excessive demands. Only those that "might reasonably be expected to cause" them are relevant. I see no real significance to the omission of the words "would cause". The wording is sufficiently similar to preserve the requirement that any anticipated burdens on the public purse be tethered to the realities, not the possibilities, of applicants' circumstances, including the extent of their families' willingness and ability to contribute time and resources [emphasis added].

[15] Given that the "would cause" test is more or less the same as the "might reasonably be expected to cause" test, I find that the IAD was unreasonable to fault Dr. McDonald for using the former test rather than the latter.

[16] Does this affect the overall reasonableness of the IAD's decision?

[17] As noted above, the IAD gave two other reasons for placing little weight on Dr. McDonald's letter: (1) that the IAD was not allowed to depart from the medical officer's diagnosis, and (2) that Dr. McDonald had failed to adequately address the issue of excessive demand. These findings appear to have been made in the alternative to the IAD's findings about the test for excessive demand. Therefore, I find that the IAD's conclusion is not affected by its failure to properly apply *Hilewitz*.

[18] The applicant claims that the IAD erred when it held that it was not allowed to depart from the medical officer's diagnosis. Thus the applicant states that "the IAD can review expert evidence from medical experts at the de novo hearing stage that demonstrates that CIC's medical findings were erroneous." I do not agree for this is contrary to the Federal Court of Appeal's holding in *Jiwanpuri v Canada (Minister of Employment & Immigration)*, [1990] FCJ No 443, 109 NR 293 [*Jiwanpuri*] according to which, at para 8:

> The members of the [IAD] do not have the expertise required to question the correctness of the medical diagnosis reached by the officers. In fact, I am of the view that, even with the help of medical witnesses, it is not the function of the Board to do so. The Board is not expected to make a choice between the written opinion of the medical officers and that of other doctors as to the diagnosis of a medical condition suffered by an applicant. [emphasis added]

[19] The applicant cites two cases in support of its position that, notwithstanding *Jiwanpuri*, the IAD was obliged to consider whether the medical officer's diagnosis was reasonable, in light of Dr. McDonald's letter. The first case, *Dhanjle v Canada (Minister of Employment &*

Immigration) (1989), 9 Imm LR (2d) 308, is an IAD decision in which the Board uses expert medical evidence to depart from a medical officer's diagnosis. Although this case is on point, it precedes *Jiwanpuri* and so provides no guidance as to the present state of the law. The second case, *Canada (Minister of Citizenship & Immigration) v Abdul*, 2009 FC 967, [2009] FCJ No 1178, is a Federal Court decision in which the Court finds that the IAD has jurisdiction to consider errors of law, fact, and mixed fact and law, and can do so in light of new evidence that was not before the officer. This case is not on point because, although it reaffirms that the IAD can consider new evidence (which is not in dispute), it does not say that the IAD can rely on that new evidence to depart from a medical officer's diagnosis.

[20] The upshot of *Jiwanpuri* is that, although it was not open to the IAD to revisit the medical officer's diagnosis, it could consider whether the health condition specified in that diagnosis might reasonably be expected to cause excessive demand on health or social services, in light of Dr. McDonald's new evidence (see also *Deol v Canada (Minister of Employment & Immigration)*, [1992] FCJ No 1072, 145 NR 156 at paras 5-7). The IAD did, in fact, consider this issue, and held that Dr. McDonald had failed to "sufficiently speak to the issue of excessive demand of medical and social services." Furthermore, even if Dr. McDonald had adequately addressed the issue of "excessive demand," his findings on this point would be tainted by the fact that they are based on an alternative diagnosis of the father's health condition, which was not accepted by the IAD.

[21] Accordingly, this application must be dismissed.

[22] The applicant asked the Court to certify the following question as being one of general importance: "What is the jurisdiction of the IAD when dealing with conflicting medical evidence in a medical inadmissibility appeal?"

[23] The respondent submits that the proposed question does not meet the test for certification set out in *Liyanagamage v Canada (Minister of Citizenship and Immigration)* (1994), 176 NR 4, [1994] FCJ No 1637 at paras 4-6. It submits that the "jurisdiction" of the IAD to consider differing medical diagnosis has been dealt with in *Jiwanpuri*, and there is no conflict in jurisprudence requiring resolution by the Court of Appeal.

[24] The applicant submits that the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Sing*h, 2016 FCA 96 [*Singh*], has recognized that the treatment of new evidence before an administrative appeal tribunal that was not presented before the lower-level tribunal is a serious question of general importance. With the greatest of respect to counsel, *Singh* on its facts is totally distinguishable from this case. Moreover, there is nothing in *Singh* that would override the Federal Court's previous jurisprudence in *Jiwanpuri*. Accordingly, the proposed question is not appropriate for certification.

[25] As an aside, I note that the record discloses that, after the respondent received the applicant's submissions in relation to the IAD hearing, it forwarded the attached medical evidence, including Dr. McDonald's letter, to a medical officer. The medical officer concluded that the new evidence could modify the father's medical assessment, and recommended that a new medical assessment be conducted. The respondent offered to conduct a new medical

assessment if the applicant withdrew her appeal. The applicant rejected this offer, and counteroffered that the respondent should consent to her appeal. The respondent declined to do so.

[26] The proposed resolution would have allowed for the medical diagnosis to be reconsidered at the appropriate level – that of medical doctors and may have resulted in a changed diagnosis that could have resulted in a different decision on the visa application.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Adrienne Smith	FOR THE APPLICANT
Leila Jawando	FOR THE RESPONDENT

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SOLICITORS OF RECORD:

Jordan Battista LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT