Federal Court  Cour fédérale

Date: 20171219

Docket: IMM-2320-17

Citation: 2017 FC 1170

Ottawa, Ontario, December 19, 2017

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

A.B.

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

HIV & AIDS LEGAL CLINIC ONTARIO and CANADIAN HIV/AIDS LEGAL NETWORK

Interveners

JUDGMENT AND REASONS

[1] The Applicant has applied for judicial review of a decision ("Decision") of the Immigration Appeal Division ("IAD") of the Immigration and Refugee Board, dated May 5,

2017, upholding an immigration officer's decision to deny permanent resident visas to her parents. The officer denied the visas after the Applicant's father, Mr. A.B., was found to be medically inadmissible to Canada. This application is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA").

I. Background

[2] In September 2009, the Applicant, a 45 year-old Canadian citizen, applied to sponsor her parents as members of the family class. They are Chinese nationals. The Applicant's father, Mr. A.B., is 62 years-old, and her mother is 66 years-old. The Applicant immigrated to Canada in 2001 and her only sibling, her sister, immigrated in 2007. The Applicant and her sister reside close to each other in Ottawa. The Applicant's sister has two young children, Mr. and Ms. A.B.'s grandchildren. The Applicant is very close to her parents and she is in contact with them every day. The Applicant testified at the IAD that as an individual of Chinese origin, she has responsibilities and duties as the eldest daughter of the family and that care for her parents falls primarily on her. The sponsorship of her parents is important not only for family reunification purposes, but also so she can fulfil her filial obligation to her parents.

[3] As part of the sponsorship application, Mr. and Ms. A.B. were required to complete medical examinations. During the course of Mr. A.B.'s medical examination it was discovered that he is HIV positive. In a procedural fairness letter dated March 6, 2013, an immigration officer disclosed the HIV finding to Mr. A.B., and advised him that his health condition might reasonably be expected to cause excessive demand on health services pursuant to section 38(1)(c) of the IRPA. The officer allowed Mr. A.B. a chance to respond to the finding.

[4] In response, in a letter dated July 5, 2013, the Applicant submitted evidence to show the family was willing and able to cover the cost of her father's anti-retroviral medication. The Applicant also requested humanitarian and compassionate ("H&C") relief. The sponsorship application was refused on May 23, 2014 on the basis that the assessing officer found Mr. A.B. inadmissible pursuant to section 38(1)(c) of the IRPA. The officer noted the estimated cost of the drugs would be $15,000 per year and the officer was not satisfied the Applicant had the ability to pay the plan in place. The officer also noted Mr. A.B. would be eligible to apply for a provincial drug plan to cover the cost of the medication.

[5] The IAD dismissed the Applicant's appeal on May 5, 2017. The IAD upheld the officer's finding that Mr. A.B.'s health condition might reasonably be expected to cause excessive demand on health services in Canada. The IAD also concluded there are insufficient humanitarian and compassionate considerations to grant special relief.

[6] The Applicant's parental sponsorship application has taken eight years. If it were not for the cost of out-patient prescription drugs required for Mr. A.B's health condition, the Applicant's parents would be admissible to Canada as members of the family class, and they may have been reunited in Canada.

[7] The Intervenors in this Application are the HIV &AIDS Legal Clinic Ontario and Canadian HIV/AIDS Legal Network. These two organizations represent people living with HIV and they seek to advance and promote the human rights and dignity of people living with HIV. The Intervenors state they have expertise with respect to HIV-related stigma and discrimination.

II. Issues

A. Did the IAD err in the analysis of humanitarian and compassionate relief?

B. Did the IAD err in its analysis of individualized assessment?

III. Analysis

A. *Did the IAD err in the analysis of humanitarian and compassionate relief?*

[8] The IAD held there are insufficient H&C considerations to grant special relief in the Applicant's case.

[9] The Applicant submits the IAD erred in its analysis of H&C relief on four grounds. First, the Applicant argues the IAD's Decision undermines the objective of family reunification in section 3(1)(d) of the IRPA. The Applicant testified before the IAD to the close relationship she has with her parents. The Applicant also explained that, as the eldest child in a family of Chinese origin, care for her parents falls primarily on her. The Applicant submits the IAD cavalierly dismissed and minimized the Applicant's close relationship with her parents. For example, the IAD found there is no reason why the Applicant cannot communicate with her parents over the phone.

[10] Second, the Applicant submits the IAD erred in finding the threshold for H&C relief is high. The Applicant submitted a detailed mitigation plan to show how her family would cover the cost of her father's anti-retroviral drugs. The Applicant argues the IAD's failure to assess the family's ability and intention to pay for the required health services was in error.

[11] Third, the Applicant argues the IAD failed to apply a compassionate approach in assessing H&C relief. The Applicant maintains the IAD minimized the relationship the Applicant has with her parents, and dismissed the importance of this relationship in Chinese culture. The IAD also minimized the best interests of Mr. and Ms. A.B.'s grandchildren. The Applicant argues the relationship the grandchildren have with her parents cannot be substituted by phone or electronic communication, as the IAD suggests.

[12] Fourth, the Applicant submits the IAD erred in its analysis of hardship that Mr. A.B. faces in China. The Applicant submitted 128 pages of country condition evidence which speaks to the stigma of HIV individuals in China, including the risk of discrimination and prejudice. The evidence also explained there is a risk an individual's HIV status in China will be disclosed by health-care professionals. Mr. A.B. testified at the IAD to the fear he has that his status might be revealed, and the discrimination he would suffer as a result. The Applicant argues the IAD ignored this evidence, and unreasonably found Mr. A.B. would not be ostracized in China and would not suffer significant hardship.

[13] The Intervenors argue the Decision relies on and perpetuates hallmarks of HIV-related stigma. The Intervenors submit the IAD improperly concludes that Mr. A.B. does not deserve H&C relief because he is morally culpable for contracting the disease. The Intervenors point out that blaming individuals for their HIV status is a hallmark of HIV-related stigma. The Intervenors submit the way in which Mr. A.B. contracted HIV is irrelevant. The Intervenors also take issue with the IAD's finding that Mr. A.B.'s siblings in China may refuse to share drinks with him if they discover his status and they argue it appears the IAD does not understand how

HIV is contracted. The Intervenors submit the IAD minimized the impact of any HIV-related stigma Mr. A.B. will suffer in China, which contributes to the unreasonableness of the Decision.

[14] The Respondent submits the IAD reasonably assessed all relevant H&C factors. The Respondent suggests the IAD considered the IRPA objective of family reunification and recognized the importance of Chinese culture to the Applicant and her family. The Respondent argues the IAD reasonably assessed potential hardship Mr. A.B. would face in China and explained why the evidence was not accepted. The Respondent maintains the IAD does not assess the morality of Mr. A.B., but stated a fact of how Mr. A.B. contracted the disease. Further, the IAD acknowledged that Mr. A.B.'s HIV status is a "serious health condition", but recognized he was receiving free medical treatment in China, and found there was little chance that others might learn of his HIV status. The Respondent agrees that administrative decisions should not be based on stigma, and when this is the case, judicial review relief is possible.

[15] I agree with the Applicant and Interveners that the IAD erred in a number of ways in its H&C analysis. In *Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61, the Supreme Court of Canada confirms that the meaning of "humanitarian and compassionate considerations" is set out in *Chirwa v Canada (MCI)* (1970) 4 I.A.C. 338:

> [...] humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable man [*sic*] in a civilized community a desire to relieve the misfortunes of another -- so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the *Immigration Act*".
>
> *Kanthasamy* at paragraph 13, citing page 350 of *Chirwa*.

[16] It is clear an H&C decision-maker must determine whether equitable relief is warranted in the circumstances. *Damte v Canada (Citizenship and Immigration),* 2011 FC 1212 also provides a helpful starting point for an H&C analysis. In *Damte*, Justice Campbell explained humanitarian and compassionate relief at paragraph 34, as he so aptly put it:

> Applying compassion requires an empathetic approach. This approach is achieved by a decision-maker stepping into the shoes of an applicant and asking the question: how would I feel if I were her or him? In coming to the answer, the decision-maker's heart as well as analytical mind, must be engaged.

[17] In the present case, the Court asked the Respondent to identify any part of the Decision where the IAD applied compassion. The Respondent could point to only one paragraph in the Decision where the IAD, in the Respondent's view, applied compassion. The Respondent argues the IAD applied compassion in paragraph 26 of the Decision, since it was recognized the Applicant is sponsoring her parents because she wants to reunify with them:

> The appellant, and her sister, apparently communicate daily with the applicants, whether by phone or video chat. The appellant appears close to her parents. The appellant has visited China, presumably mostly to see her parents, frequently, since she has immigrated to Canada.
>
> [Decision, paragraph 26]

[18] The IAD seems to accept the Applicant appears close to her parents. However, the IAD fails to apply an empathetic approach to any other part of the H&C analysis. The complete lack of empathy or compassion in the Decision is unreasonable.

[19] In addition to not applying compassion, the IAD does not believe the Applicant's unchallenged testimony. Throughout the Decision, the IAD uses the word "apparently" or "allegation" six times in reference to the Applicant's testimony and evidence:

> The appellant, and her sister, apparently communicate daily with the applicants, whether by phone or video chat. […]
>
> [Decision, paragraph 26]
>
> As of now, her parents are fine. They apparently do not require personal assistance from their children. […]
>
> [Decision, paragraph 28]
>
> The allegation was that there is daily communication between the sisters and her parents, and the children are involved. […]
>
> [Decision, paragraph 33]
>
> The evidence was that, between them, they have six siblings in their city. None of them, though, know the father is HIV positive. If they did, it was alleged, they would be shunned.
>
> [Decision, paragraph 45]
>
> The father attends at hospital for his consultations. There is allegedly a sign in the hospital which suggests that the area he goes to treats HIV positive patients. […]
>
> [Decision, paragraph 46]
>
> The applicants have known their siblings for 50 or 60 years or more. It was alleged they are on good terms. […]
>
> [Decision, paragraph 48]

[20] It is trite law when an applicant testifies, and swears to tell the truth, a presumption is created that those allegations are true unless there are reasons to doubt their truthfulness (*Maldonado v Minister of Employment and Immigration.*, [1980] 2 F.C. 302 (C.A.) at 305). Adverse findings of credibility based on implausibility may only be made in the "clearest of

cases" and the decision-maker has a duty to justify its credibility findings with clear reference to the evidence (*Valtchev v Canada (MCI)* 2001 FCT 776 at paragraphs 7 and 8).

[21] The Respondent argued the IAD used "inexact" language with respect to these references. Notwithstanding the able efforts of the Respondent's counsel to persuade me otherwise, in my opinion, no clear negative credibility finding was made against the Applicant's testimony. It is not stated in the Decision why the IAD fails to accept the Applicant's evidence. Instead, the IAD frames the Applicant's evidence as "allegations".

[22] The IAD makes additional undue negative inference findings against the Applicant's evidence. For instance:

> The appellant testified that she wants hugs from her parents daily, and wants to eat her mother's home-cooked food every day. She testified that she is so distraught that she cannot concentrate on her studies. Despite this stress, however, the appellant indicated that, in April 2017, she will receive three separate professional designations – CPA, CFA and FRM. Apparently, she is able to sufficiently concentrate to achieve this. The appellant, though, in fact is a 45-year old successful professional woman, thus the Panel finds that the above expressions of thought constitute excessive sentimentality and embellishment.
>
> [Decision, paragraph 36]

[23] It is unclear what the Applicant's status as a 45-year-old professional woman has to do with her desire to enjoy her parents' affection and home-cooked food. The IAD uses the Applicant's success to undermine her evidence, inferring her success in obtaining the CPA, CFA and FRM to be proof that any adversity she has faced in doing so is negligible. In my view, these findings illustrate the IAD is drawing conclusions about the Applicant's credibility without

explicit recognition. If the IAD believed the Applicant's testimony to be lacking in credibility with regard to the hardship she faces in the absence of her parents, a clear finding should have been stipulated and supported with a logically sound rationale. Again, if the IAD believed the Applicant's evidence to be lacking in credibility, a clear finding had to be made.

[24] The IAD makes three references to how the Applicant's father contracted HIV. I agree with the Intervenors that the way in which Mr. A.B. contracted HIV is not relevant to the sponsorship appeal. The circumstances under which Mr. A.B. contracted HIV are wholly irrelevant to the issue before the IAD, as are any issues related to the Applicant's father's moral character. The IAD appears to make judgments against Mr. A.B.'s moral character, and in doing so, the IAD acts as moral police:

> The reason why it is claimed the family will shun [the Applicant's parents] is a perception that such patients have loose morals, in that a key way the virus is transmitted is by having sex. In fact, it turns out that the father did get the virus from having an affair. It is noteworthy, perhaps, that this did not come out until the Panel directly asked the appellant why her father had the virus.
>
> [Decision, paragraph 47]
>
> If there is any antipathy, the Panel finds, then it would most likely be against the father for risking a long-standing marriage by having an affair in his middle age or later. The sister conceded that this could indeed be part of the reason her aunts and uncles might shun her parents, if they found out.
>
> [Decision, paragraph 49]
>
> [Emphasis added]

[25] The IAD then continues to evaluate the moral values of Mr. A.B. by stating:

> […] It is unfortunate that the father had an affair which led him to become HIV positive. However, this was again, a risk he took,

> which was unlikely but reasonably foreseeable, and it has unfortunately presented him with very significant problems.
>
> [Decision, paragraph 59]
>
> [Emphasis added]

[26] The above three references are irrelevant to the objective of the IRPA. The choice of language by the IAD is troublesome because it unduly chastises Mr. A.B. for having HIV. The IAD seems to suggest that because of the "risk he took", Mr. A.B. is deserving of hardship.

[27] The IAD also errs in its assessment of the best interests of the children. The IAD Member acknowledges the best interests of the children are to be considered. The IAD then holds:

> With respect to Chinese culture and values, this has been dealt with above – while it would be ideal for the grandparents to be near the sister and the children, each of the sisters are capable of infusing the children with Chinese culture.
>
> In terms of contact, visits can occur, to China, and the electronic and phone communication can continue. The Panel notes, however, that the applicants only saw only one of their grandchildren once, several years ago, when the oldest was not even a year old. As the sisters said, phone and video communication is not like the real thing. Thus, it appears that no real close bond exists between the applicants and the children, as they have never met, except for the oldest, when he was an infant, and will not remember. Thus, the children, in the Panel's estimation, will not be significantly negatively impacted by the continued absence of the applicants from their day to day life.
>
> All things considered, while it would be a good thing for the children to have their own grandparents living nearby, it is not essential, and there appears to be no reason why the children will be significantly negatively affected by their continuing absence.
>
> [Decision, paragraphs 55-57]
>
> [Emphasis added]

[28] While it is undeniable the Applicant and her sister are able to infuse the grandchildren with Chinese culture, there are teachings of which the children will be deprived due to the physical absence of their grandparents. The Applicant argues that it is not in the grandchildren's best interest to be deprived of this important element of their cultural heritage. With respect to the best interests of the children, the IAD conducts a cursory analysis of the children, and finds because the grandchildren and grandparents do not reside together, they do not have a "close bond." The IAD then concludes continuous separation would not negatively impact the grandchildren and having their grandparents reside close by is "not essential". This perverse and capricious reasoning is not what the courts have established is meant by being alert, alive and sensitive to the best interests of the children. The IAD presumes the bond will not be stronger in the future and instead engages in an unduly restrictive analysis of the best interests of the children.

[29] Further, the IAD finds the absence of a physical presence between the grandchildren and their grandparents means they have not formed a close bond, evoking the grandchildren's inability to remember their grandparents. This method of thought is problematic for two reasons. First, the evidence provides the grandchildren do, in fact, know their grandparents through the use of telephone/electronic communication, and would likely continue to bond with them through these mediums. Second, the IAD is essentially suggesting continued separation of the grandchildren from their grandparents will ensure that they will not, in the future, form the stronger bonds that are likely to result from physical contact. Such perverse conclusions by the IAD surely cannot be what is meant by the "best interest of the child" and are unlikely to have resulted should the IAD have considered the future relationship between the grandchildren and

their grandparents or, for that matter, if the IAD was alert, sensitive and alive to the issues before it.

[30] As I find the IAD Decision to be unreasonable, it is not necessary for this Court to address the second issue.

IV. Conclusion

[31] Given the IAD's failure to reasonably determine the H&C issues as described above, I find the Decision under review is unreasonable.

[32] The Respondent proposed three questions for certification, only one of which is relevant to this judicial review:

> "Is the ability and willingness of applicants to defray the cost of their out-patient prescription drug medication (in keeping with the provincial/territorial regulations regulating the government payment of prescription drugs) a relevant consideration in assessing whether the demands presented by an applicant's health condition constitute an excessive demand?"

[33] Given my conclusion, this question is not determinative of the present judicial review application and therefore does not meet the test for certification. As a result, there are no questions to certify.

JUDGMENT in IMM-2320-17

THIS COURT'S JUDGMENT is that

1. The decision under review is set aside and the matter referred back for redetermination by a differently constituted panel.
2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2320-17
STYLE OF CAUSE:	A.B. v THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND HIV & AIDS LEGAL CLINIC ONTARIO and, CANADIAN HIV/AIDS LEGAL NETWORK
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 27, 2017
JUDGMENT AND REASONS:	AHMED J.
DATED:	DECEMBER 19, 2017

APPEARANCES:

Wennie Lee	FOR THE APPLICANT
Martin Anderson Khatidja Maloo Alam	FOR THE RESPONDENT
Meagan Johnston	FOR THE INTERVENERS
Adrienne Smith	FOR THE INTERVENERS

SOLICITORS OF RECORD:

Lee & Company Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT
HALCO Barrister and Solicitor Toronto, Ontario	FOR THE INTERVENERS
Jordan Battista LLP Barristers and Solicitors Toronto, Ontario	FOR THE INTERVENERS