Federal Court Cour fédérale

Date: 20180312

Docket: IMM-3725-17

Citation: 2018 FC 287

Ottawa, Ontario, March 12, 2018

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

DANILO BUT

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The case before me is an application for judicial review of Immigration, Refugees and Citizenship Canada's ("IRCC") decision to refuse to reopen a permanent resident application. The application was refused because the Applicant's spouse suffers with chronic kidney disease and was therefore deemed medically inadmissible to Canada.

[2] In processing the permanent resident application, the Applicant was sent a "procedural fairness" letter to outline a medical inadmissibility concern. However, he was not provided with a "Declaration of Ability and Willingness Form" (the "Declaration Form"), contrary to the provisions of IRCC's Operational Bulletin 15 *Manual for Excessive Demand on Health and Social Services* ("OB15"). The Applicant requested that IRCC reopen his permanent resident application in order to present a Declaration Form and credible plan to manage his spouse's illness outside of the public healthcare system. This request to reopen the application was denied, and forms the subject of the present application for judicial review.

II. Facts

[3] Mr. Danilo But (the "Applicant") is a citizen of the Philippines. He is married to Neriza But, and together they have three adult children: John, Ranier, and Kirsten. Neriza and the three children live together in the city of Cabuyao, Philippines. The Applicant has lived in Canada since February 2009 and resides in Edson, Alberta, where he works as a sawmill machine operator. Although he is far away from his family, the Applicant has developed a network of friends through work and his church community.

[4] The Applicant came to Canada as part of the Temporary Foreign Worker Program so that he could support his family with a stable income. He pays taxes in Canada on his earnings, and supports his children through remittances that he sends home to the Philippines. All of his children are pursuing, or have pursued, post-secondary education. Unfortunately, his wife is ill; in 2014, she was diagnosed with chronic kidney disease. Nevertheless, the Applicant hopes that the family can be reunited in Canada following their 9-year long separation.

[5] In May 2015, the Applicant applied to become a permanent resident as an Alberta provincial nominee, with the assistance of an immigration consultant. His spouse Neriza and two youngest children were included in the application as dependents.

[6] By way of a letter dated November 9, 2016 (the "procedural fairness letter"), IRCC informed the Applicant that a medical notification had been received with respect to his spouse. The letter stated that the medical notification mentions Neriza But's chronic kidney disease, and that the expected treatment would cost $95,000 per year over 5 years (exceeding the annual threshold of $6,450 amount for excessive demand). As such, the letter explained that there are concerns that Neriza's condition would cause excessive demand on health or social services, and that therefore the Applicant and his spouse may be inadmissible under s. 38(1) and s. 42(1)(a) of the *Immigration and Refugee Protection Act* ("IRPA"). The letter further stipulated, "[b]efore I make my final decision, you may submit additional information or documents relating to the above medical condition, diagnosis or opinion," and gave the Applicant until January 9, 2017 to respond. The procedural fairness letter did not include a Declaration Form, which is used to convey an applicant's ability and willingness to finance medical care outside of the public healthcare system, where the health condition would otherwise render the individual medically inadmissible to Canada.

[7] By way of a letter dated January 6, 2017, the Applicant's immigration consultant responded to the procedural fairness letter on behalf of the Applicant. In this response, the consultant did not contest the medical findings regarding the Applicant's wife, but instead argued that humanitarian and compassionate considerations were such that they should overcome

medical inadmissibility. The Applicant's response contained neither a Declaration Form, nor a care plan to suggest that Neriza's medical treatment could be financed outside of the public healthcare system.

[8] By way of letter dated April 18, 2017, Officer TS6985 (the "Officer") informed the Applicant that Neriza's health condition might reasonably be expected to cause excessive demand on health or social services, rendering both her and the Applicant inadmissible to Canada. This letter further acknowledged that the Applicant's response to the procedural fairness letter had been received on January 26, 2017, but that the information contained therein did not change the Officer's assessment of Neriza's health condition.

[9] The Applicant retained legal counsel. On May 13, 2017, the Applicant wrote to IRCC and urged that his case be reopened on two grounds. First, he argued that he had been denied procedural fairness due to the failure of his immigration consultant to submit a Declaration Form in response to the procedural fairness letter. Second, he stated that humanitarian and compassionate considerations – notably discrimination on the basis of education in the Philippines, and his longstanding establishment in Canada – militate in favour of granting the permanent resident application.

[10] On June 5, 2017, the Officer responded, indicating that there were insufficient reasons for re-opening the application.

[11] On June 20, 2017, the Applicant again requested that his file be reopened. On this occasion, the Applicant cited the presence of new and relevant evidence to support the re-opening of the application; namely, a report of the House of Commons Standing Committee on Citizenship and Immigration entitled *Starting Again: Improving Government Oversight of Immigration Consultants to the House of Commons* published June 16, 2017. The Applicant further noted that the quality of the mitigating plan is a “significant” element in assessing ability and intent to cover medical costs outside of the publically-funded healthcare system, which was missing in the Applicant’s response to the procedural fairness letter. The Applicant furthermore noted provisions of OB15, which stipulates how procedural fairness is to be afforded in the context of a medical inadmissibility case.

[12] On July 11, 2017, the Officer responded by acknowledging the Applicant’s request to submit a “credible plan and signed declaration of ability and intent,” but stated that “**this was not requested of [the Applicant] in the procedural fairness letter**.” [emphasis in original]

[13] On July 20, 2017, the Applicant again wrote to IRCC requesting that the case be reopened. The Applicant argued that a breach of procedural fairness had occurred, because IRCC failed to provide the Declaration Form as required by the procedural fairness guidelines contained in OB15 when the procedural fairness letter was sent. The Applicant noted his readiness to proceed to the Federal Court with an application for judicial review, but requested that the matter be resolved outside of court in the interest of judicial economy.

[14] On August 14, 2017, the Officer again denied the Applicant's request to reopen the file. The refusal of the Officer to reopen the Applicant's permanent resident application forms the subject of this application for judicial review.

III. Issues

[15] Two issues arise on this application for judicial review:

A. What is the appropriate standard of review?

B. Was the Officer's decision reasonable?

IV. Analysis

A. *Standard of Review*

[16] The parties have disputed the appropriate standard of review applicable to this case. The Applicant asserts that, because the issue raised in this application is one of procedural fairness, the standard of review is correctness. Relying upon the Supreme Court of Canada's decision in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, the Applicant asserts that the doctrine of legitimate expectations is part of procedural fairness, and argues that that OB15 creates a clear framework that the Applicant legitimately expected would be followed in processing his permanent resident application.

[17] On the other hand, the Respondent asserts that the standard of review is reasonableness, relying on the Federal Court of Appeal's decision in *Chopra v Canada (Attorney General)*, 2014 FCA 179 and the Federal Court's subsequent application in *Phan v Canada (Citizenship and*

Immigration), 2014 FC 1203. The Respondent argues that those cases stand for the proposition that the decision of a non-adjudicative decision-maker to voluntarily reopen a decision is discretionary, and is reviewable on a standard of reasonableness.

[18] I agree with the Respondent. While it is true that questions of procedural fairness are normally reviewable on a standard of correctness, the matter before this Court is the decision of the Officer not to reopen the permanent resident application. If I were reviewing the Officer's initial decision to reject application based on an alleged procedural defect – in this case, the failure to send the Declaration Form – then the appropriate standard would be correctness. That, however, is not the decision that the Applicant seeks to review. Consequently, I find that the Officer's decision not to reopen the permanent resident application is reviewable on a standard of reasonableness.

B. *Was the Officer's decision reasonable?*

[19] The Applicant argues that the provisions of OB15 are written in mandatory language and required IRCC to send not only the procedural fairness letter, but also the Declaration Form. The Applicant adds that the provisions of OB15 create a legitimate expectation that they will be followed. On this basis, the Applicant asserts that he should have been sent a procedural fairness letter that both explained to him that he could challenge the medical diagnosis, and that he could potentially overcome the inadmissibility finding by providing a plan to manage the cost associated with his wife's chronic kidney disease outside of the public healthcare system. In the Applicant's view, after he emphasized the requirements of OB15 and his intent to submit a plan,

the Officer ought to have reopened the permanent resident application. Instead, the Officer rendered a decision that did not explain the reasons for which the request to reopen was denied.

[20] The Respondent asserts that the Applicant's argument selectively quotes and misconstrues OB15. It argues that the Federal Court of Appeal's decision in *Deol v. Canada (Minister of Citizenship and Immigration)* 2002 FCA 271 [*Deol*] and the Supreme Court of Canada's decision in *Hilewitz v. Canada (Minister of Citizenship and Immigration),* 2005 SCC 57 [*Hilewitz*] make it clear that the Officer was not required to invite the Applicant to supply a plan to manage the demand on health services, because such a plan is only relevant with respect to social services and health services that are not part of the publicly funded healthcare system. The Respondent further asserts that a full reading of OB15 demonstrates that excessive demand on <u>health services</u> is considered differently to excessive demand on <u>social services</u>, and an applicant's willingness to pay is not a relevant factor where the required treatment is provided through the public healthcare system.

[21] In order to determine whether the Officer's decision was reasonable, it is useful to first outline how OB15 guides immigration officers in processing medical inadmissibility cases. The relevant provision of OB15 is as follows:

Instructions for visa or immigration officers	**Instructions destinées aux agents d'immigration ou des visas**
1. Upon receipt of this opinion from the medical officer (with an accompanying narrative report, list of social services, outpatient medication and overall expected costs), the visa or immigration officer	1. À la réception de l'avis du médecin agréé (qui comprend un compte rendu et une liste des coûts des services sociaux, des médicaments sur ordonnance pour patient non hospitalisé et des coût globaux

should	prévus), l’agent d’immigration ou des visas doit :
◦ send the procedural fairness letter (excessive demand), the relevant sections of the IRPR, and the Declaration of Ability and Willingness to the applicant (this letter invites the applicant to provide additional information required to overcome the finding of inadmissibility);	◦ envoyer au demandeur la lettre relative à l’équité procédurale (fardeau excessif), les dispositions pertinentes du RIPR et la Déclaration de capacité et d’intention (cette lettre invite le demandeur à fournir les renseignements supplémentaires requis pour surmonter l’interdiction de territoire pour motifs sanitaires);
◦ ensure the procedural fairness letter explicitly informs the applicant of the required care, social services and outpatient medication that are critical to the individual being assessed as medically inadmissible (M5); and	◦ s’assurer que la lettre relative à l’équité procédurale informe explicitement le demandeur des soins, des services sociaux et des médicaments sur ordonnance pour patient non hospitalisé nécessaires qui sont essentiels à la personne jugée interdite de territoire pour des raisons médicales (M5);
◦ ensure the procedural fairness letter explains that the applicant may challenge the diagnosis and list of required services and that the applicant must demonstrate they have a plan to obtain all the services and manage the costs associated with the services as outlined in the letter, or provide an alternate, detailed plan with costs.	◦ s’assurer que la lettre relative à l’équité procédurale explique que le demandeur peut contester le diagnostic et la liste des services requis et qu’il doit démontrer qu’il a un plan pour obtenir tous les services et gérer les coûts associés à tous les services indiqués dans la lettre, ou pour fournir un plan de rechange détaillé indiquant les coûts.
Note: The applicant may then decide to	**Remarque :** Le demandeur peut alors décider :

□ accept the medical opinion and not respond to the procedural fairness letter;	□ d'accepter l'avis médical et de ne pas répondre à la lettre relative à l'équité procédurale;
□ challenge the medical opinion and/or assessment of excessive demand; or	□ de contester l'avis médical ou l'évaluation de fardeau excessif, ou les deux;
□ accept the medical opinion and submit a proposed plan that details where they will secure the essential services, the cost of these services and outpatient medication, and how they will pay for the services.	□ d'accepter l'avis médical et de proposer un plan détaillé indiquant où il obtiendra les services essentiels, le coût de ces services et des médicaments sur ordonnance pour patient non hospitalisé, et la façon de payer pour ces services.
[emphasis added]	[Je souligne]

[22] The Officer did not send the Declaration Form, contrary to the guidance provided in OB15. Although this was brought to the Officer's attention in the Applicant's letter of July 20, 2017, it is not addressed in the Officer's decision not to reopen the permanent resident application. Instead, the Officer, simply reiterates that the Applicant was notified of the potential inadmissibility concern, afforded an opportunity to respond, and that the additional information he provided was insufficient to reverse the initial conclusion.

[23] In my view, the Officer's decision not to reopen the permanent resident application is unreasonable. If the Officer believed that the Applicant's legitimate expectations had been upheld and procedural fairness afforded, despite his or her actions being *prima facie* contrary to the provisions of OB15, it was his or her obligation to provide reasons for that view. The letter of

August 14, 2017 offers no reasons for which the Declaration Form was not provided. Rather, the Officer merely reiterates that the file was reviewed in its entirety and that he or she remained satisfied that Neriza But would cause excessive demand on health services in Canada.

[24] In oral argument, the Respondent referred me to the Global Case Management System (GCMS) notes, specifically an entry of June 5, 2017 which indicates that the procedural fairness letter did not include the Declaration Form because “for this specific medical diagnosis, the health services required were publically funded without a cost-recovery mechanism therefore an applicant’s willingness or ability to pay was not a relevant factor.” The Respondent urged that this constitutes the reason for which the Applicant’s request to reopen was rejected.

[25] I disagree. First, the GCMS entry is dated June 5, 2017 and, by the Respondent’s own argument, it was only on July 20, 2017 that the Applicant, “…changed tact completely, discarding his pleas not to be prejudiced by the negligence of his representative, and cast blame on the officer for *not* asking for a ‘credible plan’ to manage demand and insisted that the department’s guidelines required the officer to do so” [emphasis in original]. If the Applicant only raised the issue of compliance with OB15 on July 20, 2017, then a GCMS note which predates it cannot logically constitute “reasons” for the Officer’s refusal to reopen the permanent resident application. Second, the Officer’s decision of August 14, 2017 does not say that a declaration of willingness or ability to pay was not a relevant factor; instead, it only reiterates that the Applicant was afforded the opportunity to submit additional information and that having reviewed the file, the decision remained unchanged. If the Applicant’s request was denied because the declaration of willingness or ability to pay was not a relevant factor, I see no reason

for which this was not clearly communicated to him in any of his ongoing communications with IRCC, much less the decision before me.

[26] In spite of the Respondent’s attempt to supplement the Officer’s decision with the argument set out in its written submissions (ie. the Declaration Form was not provided because it is only relevant in the case of social services and health services outside of the publically funded healthcare system, as per *Deol* and *Hilewitz*), the fact remains that the Officer did not provide those reasons when exercising his or her discretion not to reopen the file. In other words, the Respondent’s argument aims at justifying the failure to provide the Declaration Form, rather than the reason for refusing to reopen the permanent resident application. The Respondent may well be correct that the Officer was under no legal obligation to provide the Declaration Form, but that is a matter for another day. In the case before me, the Officer provides no reasons as to why, in light of the clear provisions of OB15, he or she did not reopen the file. This constitutes a reviewable error.

[27] I would be remiss not to mention the concerns I have with the language employed in the Respondent’s written submissions. I will reproduce a section of them in order to help express this concern:

> The Applicant pounced. In a third request for reconsideration, dated July 20, the Applicant changed tact completely, discarding his pleas not to be prejudiced by the negligence of his representative, and cast blame on the officer for *not* asking for a ‘credible plan’ to manage demand and insisted that the department’s guidelines required the officer to do so. The Applicant threatened litigation and demanded that the officer reopen the case and do what the officer was allegedly required to do, but failed to do, and ask for a ‘credible plan’ to manage demand [emphasis in original].

[28] During the hearing, the Court brought Respondent counsel’s attention to the inappropriateness of language used in the first sentence which, in my view, is unnecessary and inappropriate to place before this Court.

[29] The remainder of the paragraph casts aspersions on the Applicant for exercising his right to question whether the Officer in this case did what was required by law, and the Applicant’s preparedness to assert his rights before this Court. Far from a bare threat of litigation, the Applicant’s letter of July 20, 2017 requested that the matter be settled outside of court in the interest of judicial economy, while simultaneously declaring a readiness to take the matter to the Federal Court for relief if necessary (which, of course, he has done). The expression of an applicant’s readiness, in good faith, to appear before this Court to enforce his or her legal rights ought never to be so cavalierly dismissed by an officer of the court. Naturally, it is the Respondent’s duty to advance his client’s case to the best of his abilities; however, that obligation is in no way inconsistent with demonstrating a modicum of respect for the Applicant’s legitimate interest in challenging a decision that will profoundly impact his life. The Applicant’s wife is ill, and he has been separated from his children for the past 9 years. In my view, <u>any</u> person in such a position would want to be certain that his or her permanent resident application would receive the most thorough scrutiny in the face of a negative decision. It would do well for the Respondent to keep in mind the stakes for the Applicant – that is, prolonged separation from his family and uncertainty of status in Canada – when formulating written submissions to be placed before this Court.

V. Certification

[30] Counsel for both parties were asked if there were questions requiring certification, they each stated that there were no questions arising for certification and I concur.

JUDGMENT in IMM-3725-17

THIS COURT'S JUDGMENT is that:

1. The decision under review is set aside and the matter returned back for redetermination by a different officer.
2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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