Federal Court  Cour fédérale

**Date: 20101214**

**Docket: IMM-6201-09**

**Citation: 2010 FC 1285**

**Ottawa, Ontario, December 14, 2010**

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

**BETWEEN:**

**KATARINA ALEKSIC**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This application review concerns a November 24, 2009 decision of the Immigration Appeal Division (IAD) denying the Applicant's appeal of the refusal by a visa officer to grant a permanent resident under a family class sponsorship for the Applicant's elderly parents because of the inadmissibility of the Applicant's father due to poor health.

[2] For reasons that follow, I am dismissing this application for judicial review.

**Background**

[3] Ms. Katarina Aleksic (the Applicant) was born in Serbia and landed in Canada on August 15, 1996, where she became a Canadian citizen. She and her husband are pharmacists. Over the years, her parents, both Serbian, have come to Canada to spend several winter months with the Applicant and her sister and to visit their grandchildren.

[4] The Applicant applied to sponsor her parents for permanent residence. On August 30, 2006, the visa officer informed the Applicant that her parents might be inadmissible due to her father's health conditions. The Applicant submitted materials and submissions in response to the visa officer's notification.

[5] On November 16, 2006, the visa officer informed the Applicant's parents that they did not meet the requirements for immigration to Canada, outlining the following:

> Pursuant to paragraph 38(1) of the *Immigration and Refugee Protection Act* (IRPA) your family member, Jezdimir Aleksic, is a person whose health conditions, ischemic heart disease – chronic and chronic obstructive pulmonary disease, might reasonably be expected to cause excessive demand on health or social services …As a result you are inadmissible to Canada on health grounds.

[6] The Applicant appealed this decision. A hearing at the Immigration Appeal Division was held on October 5, 2009.

**Decision Under Review**

[7] In its decision dated November 24, 2009, the Immigration Appeal Division considered whether the refusal was valid in law having regard to the facts, and, if so, whether relief should be granted on humanitarian and compassionate grounds.

[8] The IAD referenced section 38(c) of *IRPA* which provides that a foreign national may be determined to be inadmissible on medical grounds if their health condition might reasonably be expected to cause excessive demand on health or social services. It considered the definition for excessive demand as defined in section 1(1) of the *Immigration and Refugee Regulations*, SOR/2002-227.

[9] It considered whether there was a defect in the refusal, including failure to disclose the medical condition, failure to give notice, failure by medical officers to base their opinion on medical evidence, or reasonably conclude excessive demand arises in the circumstances of the case at hand.

[10] The IAD found that the visa officer's notification letter properly described the nature of the father's medical condition, the Applicant had been given an opportunity to provide additional information to contest the preliminary medical assessment, and the medical assessment was comprehensive and based on medical evidence.

[11] The IAD took note of the Applicant's submissions. Both the Applicant and her husband had testified that her father was an active person and never hospitalized in Canada. The Applicant

submitted that her father would not require medical services described in the medical assessment. Moreover, the Applicant paid for his oxygen costs.

[12] The IAD held that while both were health professionals (pharmacists), neither of them were "physicians qualified to give a medical determination of the potential for the applicant's health condition to cause excessive demand on the Canadian system."

[13] The IAD noted that while reunification of families is a cornerstone of Canada's immigration, it must be balanced against the need to protect access to health social services by Canadians and permanent residents.

[14] The IAD considered that the family still had opportunities to maintain family ties, although more difficult. It also concluded the best interests of the children involved would still be served as they would be able to benefit from time with their grandparents under the current arrangements. The IAD declined to grant humanitarian and compassionate relief.

**Legislation**

[15] The *Immigration and Refugee Protection Act*, 2001, c.27 (IRPA)

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| 3. (1) The objectives of this Act with respect to immigration are | 3. (1) En matière d'immigration, la présente loi a pour objet: |
| (d) to see that families are reunited in Canada; | d) de veiller à la réunification des familles au Canada |
| 38. (1) A foreign national is inadmissible on health grounds if their health condition | 38. (1) Emporte, sauf pour le résident permanent, interdiction de territoire pour motifs |

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| (c) might reasonably be expected to cause excessive demand on health or social services. | sanitaires l'état de santé de l'étranger constituant vraisemblablement un danger pour la santé ou la sécurité publiques ou risquant d'entraîner un fardeau excessif pour les services sociaux ou de santé. |
| 42. A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if | 42. Emportent, sauf pour le résident permanent ou une personne protégée, interdiction de territoire pour inadmissibilité familiale les faits suivants : |
| (a) their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible; | a) l'interdiction de territoire frappant tout membre de sa famille qui l'accompagne ou qui, dans les cas réglementaires, ne l'accompagne pas; |

The *Immigration and Refugee Protection Regulations* (SOR/2002-227)

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| 1.(1)… | 1.(1)… |
| "excessive demand" means | « fardeau excessif » Se dit : |
| (a) a demand on health services or social services for which the anticipated costs would likely exceed average Canadian per capita health services and social services costs over a period of five consecutive years immediately following the most recent medical examination required by these Regulations, unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is no more than 10 consecutive years; or | a) de toute charge pour les services sociaux ou les services de santé dont le coût prévisible dépasse la moyenne, par habitant au Canada, des dépenses pour les services de santé et pour les services sociaux sur une période de cinq années consécutives suivant la plus récente visite médicale exigée par le présent règlement ou, s'il y a lieu de croire que des dépenses importantes devront probablement être faites après cette période, sur une période d'au plus dix années consécutives; |
| (b) a demand on health | |

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| services or social services that would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada as a result of an inability to provide timely services to Canadian citizens or permanent residents. | b) de toute charge pour les services sociaux ou les services de santé qui viendrait allonger les listes d'attente actuelles et qui augmenterait le taux de mortalité et de morbidité au Canada vu l'impossibilité d'offrir en temps voulu ces services aux citoyens canadiens ou aux résidents permanents. |

**Issues**

[16] I would pose the issues as follows:

1. Did the IAD conduct a proper analysis, taking into account all the relevant evidence that was before it?
2. Did the IAD err in rejecting the *Hilewitz* arrangement of having the Applicant privately pay for her father's medical costs?
3. Did the IAD err in declining to grant humanitarian and compassionate relief?

**Standard of Review**

[17] The Supreme Court of Canada established two standards of review in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, reasonableness and correctness. A reviewing court may consider and apply past jurisprudence which has already established the standard of review for a particular case.

[18] Case law has applied the standard of reasonableness to Immigration Appeal Division decisions regarding medical inadmissibility: *Vazirizadeh v Canada (Minister of Citizenship and*

*Immigration*), 2009 FC 807, *Vashishat v Canada (Minister of Citizenship and Immigration*), 2008 FC 1346. As such, the standard of review of the IAD's decision in this matter, a question of mixed fact and law, is reasonableness as set out in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

**Analysis**

*Relevant Evidence in the Board's Analysis*

[19] The Applicant submits that the assessment by the medical officer was generic rather than individual as required by in *Hilewitz v Canada (Minister of Citizenship and Immigration)* 2005 SCC 57 [*Hilewitz*]. As an example, the Applicant also points out that she and her husband had submitted reports on her father's conditions, and that she had relayed a doctor's report indicating that her father's condition was not likely to change suddenly and that he would not require corrective surgery as his health was such that he could not survive such procedures. The Applicant submits that these reports were not considered in the assessment.

[20] I note that there was medical evidence before the IAD which it considered. I also note that although the Applicant complained of the assessment being generic rather than an individualized assessment of her father's condition, the finding of the father's serious medical condition and strong history of ischaemic heart disease complicated by the presence of arterial hypertension is not in dispute. Neither is his chronic obstructive pulmonary condition.

[21] In the visa officer's letter of August 30, 2006 inviting the Applicant to make further submissions on her father's medical condition, the officer makes reference to the medical

notification prepared by the medical officer regarding the Applicant's father. This medical notification contains the following observation:

> This 72 year old applicant has a long history of ischemic heart disease complicated by the presence of arterial hypertension as well as increased serum cholesterol, all for which he requires several medications. He reports that he had a positive coronary angiogram (showing coronary stenosis) but has been treated medically rather than surgically.
>
> Mr. Aleksic also has chronic obstructive pulmonary disease. His pulmonary function results show a markedly decreased FEV1 (forced expiratory volume in 1 second) of only 34% of his predicted value placing him in the severe category for this condition. His blood oxygen saturation (Sa02) at rest of also below normal being only 91% (N:>98%) with desaturation occurring during exercise with the Sa02 decreasing to 85% after walking for give minutes. His resting level of oxygen is currently very near the level where it could be expected that home oxygen would be required. The pulmonary disease is also evident on the chest X-ray with emphysematous changes evident, along with a dilated central pulmonary artery indicating chronic pulmonary hypertension. He requires multiple medications to improve his breathing capacity…

This medical notification, included in evidence before the IAD, clearly contains an individualized assessment of the Applicant's father's medical condition.

[22] The medical officer's assessment went on to note that the natural history for ischemic heart disease is "progression requiring the on-going care and management by specialists." Similarly, the medical officer wrote the natural course of chronic obstructive pulmonary disease is "progression and deterioration." The medical officer opined that the progression for both might be reasonably expected to cause excessive demand on health services.

[23] The Applicant's submissions sought to hold up her father's past positive health history as predictive of future health. That does not displace the medical officer's prognosis based on the

review of her father's specific medical diagnosis and comparison as against the normal progression of his illnesses.

[24] The Applicant claims her father has no need for future costly medical surgery, but, as the Respondent points out, the Applicant did not provide a doctor's report that her father could not undergo any surgical medical procedures, but rather referred to a conversation with a medical doctor in Belgrade who so advised her. The IAD properly did not consider this hearsay information.

[25] The IAD did not err in noting that the Applicant and her husband, although health professionals, were not physicians qualified to give a medical opinion of her father's health. The Applicant's evidence did not otherwise significantly challenge the validity and accuracy of the medical officer's medical report.

*The Hilewitz Arrangement*

[26] The Applicant submits that the IAD failed to consider the fact that OHIP would not cover medication and oxygen for her father, and that she had offered to pay for medication and oxygen. As a result, the Applicant submits that the IAD should not have rejected the *Hilewitz* arrangement that she had proposed.

[27] Although the Respondent submits that this Court has already confirmed in *Lee v Canada (M.C.I.)*, 2006 FC 1461 that *Hilewitz* did not equally extend to publicly funded health services, I find there is an exception in *Jafarian v Canada (M.C.I.)*, 2010 FC 40, [2010] 360 FTR 150, where

the Court extended the principles enunciated in *Hilewitz* to prescription drugs as long as the majority of the funds for the prescription drug in question are not contributed by governments.

[28] However, the medical evidence shows that the Applicant's father would require more than medication and oxygen, and was expected to likely require ongoing care and management by specialists in various fields of medicine, health services provided by government.

[29] There was no indication that the IAD misapprehended the scope of health care services that the Applicant's father would have required in the future. The IAD did not err in rejecting the *Hilewitz* arrangement of having the Applicant privately pay for her father's medical costs, since *Hilewitz* dealt specifically with an applicant's ability to pay for social services and not health services.

[30] I find that the IAD conducted a proper analysis of the visa officer's refusal decision, taking into account the relevant medical evidence that was before the officer. Its conclusion that the Applicant had not met her burden of proof is reasonable.

*Humanitarian and Compassionate Relief*

[31] The Applicant submits that the IAD ignored the evidence of hardship her father would face with air travel, and the financial impact she would deal with if she had to move back to Serbia to be with her parents. The Applicant also submits that the IAD had merely paid lip service to the concept of the children's best interest, concept of reunification of family, and hardship for each family member.

[32] The IAD was aware that coming to Canada as visitors was increasingly difficult for the Applicant's parents. The IAD also recognized the difficulty that the Applicant would face if she had to move back to Serbia to care for them. It repeated in detail the Applicant's argument about the childcare support provided by her parents for the children and found the Applicant had options, while not convenient or easy, open to the family. There was no indication that the IAD ignored or misapprehended any material aspect of the Applicant's position.

[33] It is clear that the IAD considered the Applicant's concerns when making its decision, but it was reasonable for the IAD in the exercise of its discretion to give greater weight to the enforcement of the medical inadmissibility provision under section 38 of *IRPA*. It was open to the IAD to balance in the way that it did the policy of family reunification against the need to protect the Canadian health care system from excessive demands on health services.

[34] The granting of humanitarian and compassionate relief is discretionary, and I conclude the IAD did examine these humanitarian and compassionate considerations while balancing them out with the need to protect access to health care services. The IAD's decision was reasonable, being within the range of acceptable outcomes.

*Questions for Certification*

[35] The Applicant submitted the following questions for certification:

> 1. The criteria subtending a valid medical opinion reached under the Immigration legislation was clarified in February of 2005 by the case of *Hilewitz*. In *Hilewitz* the Supreme Court of Canada held that a valid medical opinion needs to assess the applicant in his uniqueness by way of an individualized assessment and based upon the probability of the use of services rather than merely stating the eligibility of such

services. Does this *dicta* apply for medical services or do the principles enunciated in *Hilewitz* apply only to individuals attracting social services?

2. Is the medical/visa officer/IAD required to take into account both medical and non-medical factors, such as the availability, scarcity or cost of publicly funded services, along with the willingness and ability of the applicant or his or her family to pay for the services?

3. Can the medical/visa officer/ IAD determine the nature or the severity or probable duration of health impairment without do so in relation to a given individual?

4. Can the medical officer/visa officer/IAD attach a cost assessment to a disability or health condition based on the classification of the impairment rather than on its manifestation in an individual and without analyzing whether that particular individual would reasonably cause excessive demands on public funds?

5. Is the medical officer/visa officer/IAD required to assess all medical and non-medical factors?

6. Is it the visa officer or the medical officer that needs to resolve all of the medical and non-medical information contained in the fairness letter? Can the visa officer substitute his opinion on any of these matters?

7. In assessing the legality of the visa/medical officer's decision is the IAD correct in concluding that individualized assessment of excessive demands as enunciated in *Hilewitz* does not apply with regards to medical services?

8. In limiting application of individualized assessment to social services, does such limitation colour the IAD's H&C jurisdiction and leading exclusion of all deserving factors?

[36] The Respondent objected to the certification of the Applicant's questions on the grounds that the Applicant submitted the questions out of time and that the Applicant has not addressed the requirements to justify certification of questions under section 74(d) of *IRPA*.

[37] In order to be certified, a proposed question must transcend the interests of the immediate parties to the litigation and contemplate issues of broad significance or general application, while

also being determinative of the appeal: *Canada (Minister of Citizenship and Immigration) v Liyanagamage* (1994), 176 NR 4 (FCA). I will address each proposed question.

[38] Questions 1, 3 and 4 address the same underlying issue of whether an assessment must be individualized. The principle that an assessment of one's reliance on health services must be individualized has already been accepted in jurisprudence: *Jafarian v Canada (Minister of Citizenship and Immigration)*, 2010 FC 40 at para 23.

[39] Question 2, which is virtually identical to the issue in question 5 regarding the requirement to look at both medical and non-medical factors, has already been established in case law: see, for example, *Sapru v Canada (Minister of Citizenship and Immigration)*, 2010 FC 240 at para 19.

[40] As for question 6, the role of the visa officer in relationship to the medical officer's opinion has also already been examined in case law: *Canada (Minister of Employment and Immigration) v Jiwanpuri (F.C.A.)*, [1990] 109 NR 293, 10 Imm LR (2d) 241; and *Sapru v Canada (Minister of Citizenship and Immigration)*, 2010 FC 240 at para 12-13.

[41] With regards to questions 7 and 8, I cannot find any part in the IAD decision indicating the IAD may have suggested that individualized assessment of excessive demands as enunciated in *Hilewitz* does not apply with regards to medical service. The Applicant may have misunderstood paragraph 12 of the IAD's decision, where the IAD concluded that the Applicant could not make an arrangement similar to *Hilewitz* to pay for her father's medical costs since such costs are provided by government. This question has already been settled in jurisprudence.

[42] In result, I see no need for a certified question along the lines proposed by the Applicant.

**Conclusion**

[43] For these reasons, I therefore dismiss this application for judicial review of the board's decision.

## JUDGMENT

**THIS COURT ORDERS and adjudges that:**

1. The application for judicial review is dismissed.
2. I do not certify any questions of general importance.
3. I make no order for costs.

"Leonard S. Mandamin"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-6201-09 |
| **STYLE OF CAUSE:** | KATERINA ALEKSIC v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
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| **REASONS FOR JUDGMENT AND JUDGMENT:** | MANDAMIN J. |
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