Federal Court Cour fédérale

Date: 20160617

Docket: IMM-5162-15

Citation: 2016 FC 678

Ottawa, Ontario, June 17, 2016

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

EVGENIYA KHARLAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Immigration Appeal Division [IAD] of the Immigration and Refugee Board dismissed an appeal by Evgeniya Kharlan of an immigration officer's refusal to issue a permanent resident visa to her father, Eduard Margulyan. Mr. Margulyan was found to be medically inadmissible to Canada on the ground that he is reasonably expected to cause excessive demands on Canadian health services pursuant to s 38(1)(c) of the *Immigration and*

Refugee Protection Act, SC 2001, c 27 [IRPA]. Ms. Kharlan, as the sponsor of her father's application, has sought judicial review of the IAD's decision.

[2] Ms. Kharlan does not dispute the IAD's finding that the immigration officer's decision was valid in law. She accepts that her father is inadmissible to Canada for medical reasons. However, she says that the IAD disregarded evidence that Mr. Margulyan's medical condition is not severe, and argues that its consideration of H&C factors was unreasonable.

[3] Despite the able submissions of counsel for Ms. Kharlan, I am satisfied that the IAD's conclusions were reasonable and supported by the evidence. The application for judicial review is therefore dismissed.

II. <u>Background</u>

[4] Ms. Kharlan is a Canadian citizen. In 2008, she applied to sponsor her parents for immigration to Canada under the family class sponsorship provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations]. Ms. Kharlan's mother and father are aged 75 and 79 respectively, and are both citizens of Israel.

[5] Pursuant to s 38(1)(c) of the IRPA, foreign nationals are inadmissible to Canada on health grounds if they have a medical condition that might reasonably be expected to cause excessive demand on health or social services. An "excessive demand" is defined in s 1 of the Regulations as a demand for which the anticipated cost would likely exceed average Canadian *per capita* health services over a period of five consecutive years, unless there is evidence that

significant costs are likely to be incurred beyond that period, in which case the period is extended to ten years. An “excessive demand” is also one which would add to existing waiting lists and increase the rate of mortality in Canada.

[6] The determination of whether an applicant is medically inadmissible to Canada is made by an immigration officer, based on the opinion of a medical officer designated by the Minister of Citizenship and Immigration [Minister]. In this case, the medical evidence determined that Mr. Margulyan suffers from chronic Hepatitis C, and has a diagnosis of “Liver Cirrhosis: Chronic Liver Disease”.

[7] After receiving notification that he may be medically inadmissible to Canada, Mr. Margulyan provided the Minister with a report from his physician, Dr. Iris Dotan, dated October 14, 2012. In her report, Dr. Dotan confirmed that Mr. Margulyan has chronic Hepatitis C; he was in good clinical condition; no medical treatment was recommended; the risk for hepatocellular carcinoma was “small but existing”; and his fibrosis was “progressing, but slowly”.

[8] The Minister’s designated medical officer, Dr. Réjean Paradis, prepared a report on April 17, 2012, in which he referred to the opinion of Dr. Dotan and offered the following conclusions:

> Although Mr. Margulyan’s condition has remained relatively stable, his overall prognosis remains guarded over the next 4-5 years. He is currently requiring and will continue to require close medical follow-up to ensure there is no further progression of the disease, with required lab and radiology investigations, and eventually repeated hospitalizations in a specialized liver diseases care unit if further deterioration [occurs].

[9] Dr. Paradis concluded that "the applicant remains medically inadmissible (M05) due to excessive demand on health services".

[10] Ms. Kharlan appealed the immigration officer's decision to the IAD. Pursuant to s 67(1)(c) of the IRPA, the IAD may allow an appeal if an immigration officer's decision is wrong in law or if humanitarian and compassionate [H&C] relief is justified in the circumstances.

[11] In support of her appeal, Ms. Kharlan submitted the following documentation to the IAD: (i) three reports from Dr. Dotan (the one described above and two updated reports); (ii) the report of Dr. Paradis described above; (iii) a medical report from Dr. Yulia Ron, a specialist in gastroenterology at the Tel-Aviv Medical Center, dated June 4, 2015; and (iv) a report prepared by Frances A. Marinic-Jaffer, a law student who offered her opinion on the anticipated health care costs of treating Mr. Margulyan's condition in Canada.

III. <u>The Decision under Review</u>

[12] The IAD upheld the immigration officer's decision as valid in law. The IAD was satisfied that the Minister's designated medical officer had considered all of the documents submitted by Mr. Margulyan. The IAD found Ms. Marinic-Jaffer's report to have little probative value because she was not a qualified medical professional. The IAD noted that an offer by the family to pay any excessive medical costs was unenforceable.

[13] The IAD also found that, aside from the overarching principle of family reunification, there were insufficient H&C considerations to justify granting special relief in the circumstances.

IV. Issues

[14] Ms. Kharlan does not dispute the IAD's finding that the immigration officer's decision was valid in law. She accepts that her father is inadmissible to Canada for medical reasons. However, she says that the IAD disregarded evidence that Mr. Margulyan's medical condition is not severe. She also argues that the IAD's consideration of H&C factors was unreasonable.

[15] As a preliminary matter, Ms. Kharlan objects to the Minister's reliance on an affidavit sworn by Dr. Brian Dobie on April 18, 2016, on the ground that it constitutes new evidence that was not before the immigration officer or the IAD.

V. Analysis

A. *Is the affidavit of Dr. Dobie admissible in these proceedings?*

[16] Dr. Dobie is a senior medical specialist employed by the Department of Citizenship and Immigration in its Migration Health Branch in Ottawa. According to counsel for the Minister, the purpose of Dr. Dobie's affidavit was to confirm Dr. Paradis' conclusions, summarize some of the documentary evidence that was before the IAD and, importantly, provide an update on recent developments in the treatment of chronic Hepatitis C. A new generation of direct acting antivirals is estimated to cure 95% of cases. However, the cost of the new antivirals is high: more than $80,000 per patient. The antivirals available at the time Dr. Paradis offered his opinion were expensive, but somewhat less expensive than the new generation of drugs.

[17] As a general rule, the evidentiary record before the Court in an application for judicial review is restricted to the evidentiary record that was before the administrative decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 [*Association of Universities and Colleges*]).

[18] The essential purpose of judicial review is the review of decisions, not the determination, by trial *de novo*, of questions that were not adequately canvassed in evidence at the tribunal or trial court (*Association of Universities and Colleges* at para 19, citing *Gitxsan Treaty Society v Hospital Employees' Union*, [2000] 1 FC 135 (FCA) at pages 144-45; *Kallies v Canada*, 2001 FCA 376 at para 3; and *Bekker v Canada*, 2004 FCA 186 at para 11). As the Federal Court of Appeal held in *Association of Universities and Colleges* at paragraph 20:

> There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker […].

[19] The Court of Appeal recognized three exceptions to the general rule against the receipt of new evidence on judicial review: (i) an affidavit that provides general background information in circumstances where that information might assist the court in understanding the issues relevant to the judicial review; (ii) an affidavit that is necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker; and (iii) an affidavit that highlights the complete absence of evidence before the administrative decision-maker when it made a particular finding.

[20] Dr. Dobie's evidence regarding recent breakthroughs in the development of antiviral drugs does not fall within one of the exceptions to the general prohibition on receiving new evidence on judicial review, unless it is offered only as general background information. To the extent that Dr. Dobie confirms or summarizes the evidence that was before the IAD, this is more appropriately accomplished through the submissions of counsel. In any event, Dr. Dobie's evidence is largely irrelevant. There is no dispute that it is costly to treat chronic Hepatitis C, or that treating a patient for this condition constitutes an excessive demand on Canada's health system as defined in the Regulations. Dr. Dobie's affidavit is therefore inadmissible in these proceedings.

B. *Was the IAD's consideration of H&C factors reasonable?*

[21] Decisions of the IAD regarding an applicant's medical inadmissibility are subject to review against the standard of reasonableness (*Aleksic v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1285 at para 18). This Court will interfere only if the IAD's decision falls outside of the range of possible, acceptable outcomes that are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[22] Ms. Kharlan argues that the IAD's consideration of H&C factors was unreasonable for two reasons: it addressed H&C factors in a segmented fashion, rather than as a whole; and it wrongly applied an elevated test for the sufficiency of H&C considerations based on the incorrect assumption that Mr. Margulyan's medical condition is severe.

[23] Ms. Kharlan relies on the recent decision of the Supreme Court of Canada in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]. This judgment was issued after the IAD's decision, but this Court is bound to apply the law as it exists today (*Gechuashvili v Canada (Minister of Citizenship and Immigration)*, 2016 FC 365 at para 16).

[24] *Kanthasamy* concerned s 25(1) of the IRPA, which permits the Minister to grant permanent resident status where he is of the opinion that it is "justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child who is directly affected". The Supreme Court held at paragraph 60 that circumstances warranting relief will vary depending on the facts and context of each case, but officers making H&C determinations "must substantively consider and weigh all of the relevant facts and factors before them" and decide whether, in light of the humanitarian purpose of s 25(1) of the IRPA, the "evidence *as a whole* justified relief" (emphasis in original).

[25] Ms. Kharlan says that *Kanthasamy* has changed the test that must be applied by the IAD. The Minister responds that the Supreme Court's decision is limited to H&C relief under s 25(1) of the IRPA. In any event, the Minister submits that the IAD's decision accords with the standard found in *Chirwa v Canada (Minister of Manpower and Immigration)* (1970), 4 IAC 338 (Imm App Bd) at page 350 [*Chirwa*]. The Minister notes that the IAD has applied the test from *Chirwa* for decades, and the decision was cited with approval in *Kanthasamy* (at paras 13, 30-31).

[26] In my view, *Kanthasamy* has not fundamentally changed the nature of the assessment that must be conducted by the IAD. Paragraph 67(1)(c) of the IRPA provides that the IAD may grant an appeal if there are sufficient H&C considerations to warrant special relief "in light of all the circumstances of the case". The provision therefore already contemplates a holistic assessment of all H&C considerations. Prior to *Kanthasamy*, it was always open to an applicant to argue that a decision of the IAD was unreasonable because H&C factors were considered in isolation and not together.

[27] Ms. Kharlan's criticism is essentially that the IAD failed to state explicitly that it had considered H&C factors as a whole. She does not take issue with the IAD's analysis and conclusions regarding each of the factors.

[28] I am satisfied that the IAD directed its attention to all relevant H&C factors as contemplated by *Chirwa*. These included Ms. Kharlan's establishment in Canada, her strong ties to her parents, the circumstances of her family members in Canada, the absence of any financial dependence between Ms. Kharlan and her parents, the best interests of Ms. Kharlan's children, the nature of the relationship between her parents and her children, and the IRPA's objective of family reunification. The IAD noted that Israeli nationals do not require visas to visit Canada. Indeed, Ms. Kharlan's parents currently visit Canada each year for a period of approximately two months. The IAD noted that they could stay for longer, but have in the past chosen not to do so.

[29] I am not persuaded that the IAD failed to consider the H&C factors advanced by Ms. Kharlan as a whole. Even if the IAD's approach (primarily its use of discrete headings) may

have created the appearance of a segmented analysis, it is unrealistic to suggest that a more overtly holistic consideration of the evidence would have yielded a different result. The H&C factors advanced by Ms. Kharlan were not, in any event, particularly compelling.

[30] Under the heading "extent of legal impediment", the IAD noted that Mr. Margulyan has a long history of liver disease, was found to be infected by Hepatitis C in 2002 following a blood transfusion, and that the costs associated with his medical condition are potentially extensive. For this reason, the IAD determined that the appellant had to meet a "high threshold of H&C grounds" in order to obtain special relief under s 67(1)(c) of the IRPA.

[31] The Minister says that this approach is consistently applied by the IAD, and is set out in *Jugpall v Canada (Minister of Citizenship and Immigration)*, [1999] IADD no 600 at paras 23-24. Pursuant to this standard, H&C circumstances must be commensurate with the legal obstacle to admissibility that must be overcome. Ms. Kharlan does not take issue with the IAD's reliance on this test. Rather, she argues that the IAD unreasonably applied the "high threshold" when evaluating the H&C considerations based on its "erroneous assumption about her father's medical condition".

[32] The difficulty with this assertion is that the reports of Drs. Dotan and Yulia Ron say very little about Mr. Margulyan's long-term health care needs. The statements that "he is not a candidate for a liver transplant" and "no medical treatment is currently required" do not address his health care needs over a five to ten year period, the relevant period for assessment pursuant to the Regulations. Dr. Dotan evaluated Mr. Margulyan's risk for hepatocellular carcinoma as

"small, but existing", and his fibrosis as "progressing, but slowly". However, this does not detract from Dr. Paradis' conclusion that Mr. Margulyan's overall prognosis remains "guarded". Dr. Paradis noted that Mr. Margulyan will continue to require close medical attention to ensure there is no further progression of his disease, and will eventually require repeated hospitalizations in a specialized care unit if his condition continues to deteriorate.

[33] I cannot fault the IAD's decision to place little probative value on the report of Ms. Marinic-Jaffer, a law student who offered her opinion on the anticipated costs of treating Mr. Margulyan's condition in Canada. The IAD reasonably concluded that she is not a medical professional. Ms. Kharlan argued that Ms. Marinic-Jaffer was offering an economic opinion rather than a medical one. However, her report was premised on the assumption that Mr. Margulyan would never require anything more than monitoring, an assumption that was not supported by the medical evidence.

[34] Finally, a letter of intent that confirms one's intention not to burden the public system is not enforceable in Canada (*Ma v Canada (Minister of Citizenship and Immigration)*, 2013 FC 131 at para 26, citing *Deol v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 271 at para 46). It was therefore reasonable for the IAD to place little weight on this offer from Mr. Margulyan's family.

VI. Conclusion

[35] For the foregoing reasons, I am satisfied that the IAD's conclusions were reasonable and supported by the evidence. The application for judicial review is dismissed.

VII. Certified Question

[36] Ms. Kharlan proposed the certification of two questions for appeal pursuant to s 74(d) of the IRPA. The first concerns the standard of review that applies to the IAD's choice of the legal test for granting H&C relief under s 67(1)(c) of the IRPA. The second concerns whether the Supreme Court's decision in *Kanthasamy* requires the IAD to conduct its H&C assessment in a holistic manner.

[37] This Court may certify a question only where it is dispositive of the appeal; transcends the interests of the immediate parties to the litigation; contemplates issues of broad significance or general importance; and arises from the case itself (*Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 at paras 10-12; *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113, rev'd on other grounds 2015 SCC 61; *Liyanagamage v Canada (Secretary of State)*, [1994] FCJ No 1637, 176 NR 4).

[38] Ms. Kharlan did not take issue with the proposition that H&C circumstances must be commensurate with the legal obstacle to admissibility that must be overcome. Rather, she argued that the IAD wrongly applied the "high threshold" when evaluating the H&C considerations based on its "erroneous assumption about her father's medical condition". This is clearly a question of mixed fact and law which attracts the reasonableness standard of review.

[39] With respect to the second proposed question, I have found that the IAD is required to conduct a holistic assessment of the H&C factors advanced by an applicant by virtue of s

67(1)(c) of the IRPA. *Kanthasamy* has not changed the nature of the analysis that is required of the IAD in this respect. I therefore decline to certify the second question.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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