Federal Court  Cour fédérale

Date: 20210618

Docket: IMM-4676-20

Citation: 2021 FC 623

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 18, 2021

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

RAFIK ANIS DOSS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The applicant, the Minister of Citizenship and Immigration [the Minister], is seeking judicial review of a decision rendered on September 16, 2020, by the Immigration Appeal Division [IAD]. The IAD allowed the appeal of the respondent, Rafik Anis Doss, of an

immigration officer's decision to refuse to issue a permanent resident visa to his mother, Dolores Babazoghli Finianos.

[2] For the reasons below, the application for judicial review is allowed.

II. Background

[3] Mr. Doss was born in Egypt. He has been a Canadian citizen since 2006. He is seeking to sponsor his mother, a Spanish citizen who was born and has always lived in Egypt. She is an 81-year-old widow with two other children who live in Spain and the United Arab Emirates.

[4] On February 25, 2019, an immigration officer rejected the sponsorship application, concluding that Ms. Finianos was inadmissible to Canada because she had a health condition that might reasonably be expected to cause excessive demand on health services in Canada, pursuant to subsection 38(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. She suffers from stage 4 renal failure, diabetes and hypertension.

[5] Relying on the opinion of a physician appointed by Immigration, Refugees and Citizenship Canada [IRCC], dated August 2017, the officer noted that Ms. Finianos was likely to require dialysis and/or a kidney transplant within the next five to ten years. The annual cost of dialysis treatments is $70,000 in hospital and between $30,000 and $58,000 if the treatments are administered at home. The initial cost for a kidney transplant is approximately $100,000. These costs would exceed average Canadian per capita costs over five years. The officer also noted that, because this care is reimbursed from public funds, Ms. Finianos and her family will not

have the opportunity to offset a portion of the cost of the dialysis treatments. Private clinics are rare and offer treatments only to temporary visitors, at a cost of approximately $1,000 per session. The officer noted that the waiting lists for the treatments that would be required were long and that Ms. Finianos would make them longer, thereby delaying the access of other citizens. The officer next considered the fact that Ms. Finianos had, according to the forms, two adult children living at her address. Acknowledging that this information was not necessarily up to date, the officer nevertheless held that Ms. Finianos could continue to receive her treatments in Egypt, accompanied by these two children.

[6] Mr. Doss appealed this decision to the IAD. He challenged the inadmissibility and raised humanitarian and compassionate [H&C] considerations. With respect to the inadmissibility, he alleged that his mother's health condition was stable and that her kidney condition had shown improvement as a result of a strict and disciplined diet, as demonstrated by the analysis results obtained following a medical examination she underwent in 2019 in Cairo. He also alleged that kidney transplants are not recommended past the age of 80 and that the life expectancy of a patient beginning dialysis treatments at 85 years of age is at most two years. With respect to H&C considerations, he alleged that there was insecurity in Egypt due to [TRANSLATION] "Islamic terrorism" directed at Christians in particular and that his brother and sister had left Egypt because of this instability. Mr. Doss claimed that he had sufficient financial means to sponsor his mother.

[7] After reviewing Mr. Doss's arguments on appeal, the IRCC medical team asked that Ms. Finianos undergo a new medical examination for the purpose of verifying whether the immigration officer's initial decision should be revisited.

[8] The IAD held its hearing on August 5, 2020. Mr. Doss was the sole witness.

[9] On September 16, 2020, the IAD allowed Mr. Doss's appeal. It noted that Ms. Finianos underwent a new IRCC medical examination but that she did not undergo the additional examinations required. The IAD noted the Canadian nephrologist's report presented by Mr. Doss but held that this piece of evidence had little relevance to its analysis, given that the nephrologist had never examined Ms. Finianos. Only her laboratory results were analyzed. The IAD noted that it had only the medical examination results dated August 15, 2017, and updated on February 9, 2019. As these were valid, it held that Ms. Finianos's health condition might reasonably be expected to cause excessive demand on health services in Canada.

[10] The IAD then turned to the humanitarian and compassionate considerations raised by Mr. Doss. First, it held that the costs associated with Ms. Finianos's illness were significant, but temporary. It noted Ms. Finianos's advanced age and Mr. Doss's testimony to the effect that, in the short term, his mother would not need any specific health services for her illness beyond regular follow-up. The IAD therefore held that the negative impact of the costs associated with the illness was limited.

[11] Second, the IAD held that Mr. Doss and his mother have a close relationship and that all Mr. Doss wants is to live with his mother and take care of her during her final years, as he has the financial means to meet her needs. The IAD considered this a positive element and gave it significant weight in its analysis.

[12] Third, the IAD recognized that Ms. Finianos lives alone in Egypt and has little support there. It accepted the argument of the Minister's representative that Ms. Finianos could go to live in Spain with her other son, but held that this idea was unrealistic in light of the latter's health problems and the strained relationship between his spouse and Ms. Finianos. The IAD also noted that Ms. Finianos could not go to live with her daughter in the United Arab Emirates because she could not obtain a permanent status in that country. In the circumstances, the IAD was of the view that the support Mr. Doss was able to offer his mother was more extensive and available, which strongly militated in favour of special relief.

[13] The IAD finished by recalling the objectives of the IRPA and held that sufficient H&C considerations existed to offset the excessive demand that Ms. Finianos's health condition might be expected to cause on health services in Canada.

[14] The Minister is seeking judicial review of this decision. He argues not only that the IAD erred in determining that Ms. Finianos's health condition was stable, but also that this finding led to an error in the assessment of the degree of H&C grounds required to offset the inadmissibility. Family reunification, a positive factor in this case, must be weighed against the seriousness of the diagnosis and the costs associated with the required care.

III. Analysis

[15] The standard of review applicable to decisions rendered by the IAD pursuant to paragraph 67(1)(c) of the IRPA is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16–17 [*Vavilov*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 58).

[16] When reasonableness is the applicable standard, the Court must focus on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). It must ask whether "the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). A reasonable decision must be based on reasoning that is both rational and logical (*Vavilov* at paras 102–104). The burden is on the party challenging the decision to show that it is unreasonable (*Vavilov* at para 100).

[17] The Court accepts the Minister's argument that the IAD's findings on the burden of the costs associated with Ms. Finianos's illness are not based "on an internally coherent and rational chain of analysis" (*Vavilov* at para 85) and on the evidence in the record.

[18] Subsection 38(1) of the IRPA states that a foreign national is inadmissible on health grounds if their health condition might reasonably be expected to cause excessive demand on

health or social services. The term “excessive demand” is defined at subsection 1(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[19] If the application for sponsorship is refused because the sponsored person is inadmissible on health grounds, the sponsor may appeal to the IAD pursuant to subsection 63(1) of the IRPA. The grounds by which the IAD may allow an appeal are set out at subsection 67(1) of the IRPA. Paragraph 67(1)(c) allows it to consider whether there are, in the circumstances, sufficient H&C considerations to warrant special relief.

[20] According to the principles established in *Jugpall v Canada (Minister of Citizenship and Immigration)*, [1999] IADD No 600 (QL) [*Jugpall*], the H&C grounds must be commensurate with the obstacle to admissibility. In other words, more compelling H&C factors may be required to overcome a more serious obstacle to admissibility (*Jugpall* at paras 23–25, 41–42; *Patel v Canada (Citizenship and Immigration)*, 2019 FC 394 at paras 11–12). The example used at paragraph 23 of *Jugpall* provides a useful illustration:

> A simple example illustrates the point: if one applicant is inadmissible to Canada because he has a relatively minor, treatable medical condition and another applicant is inadmissible because he has chronic kidney disease, has experienced renal failure and requires dialysis for the rest of his life, then both applicants are equally inadmissible. From the point of view of the law, they are similarly inadmissible. However, when the potential burden on health services of allowing the first applicant into Canada is compared with the potential burden of allowing the second applicant to enter Canada, it is evident that the two applicants are not in the same position. In order to succeed on appeal, both applicants need to show that there are compassionate and humanitarian grounds that warrant the granting of special relief, but the second applicant needs to bring forward a considerably more compelling case than the first applicant, given the nature of his condition.

[21] In this case, the IAD relied on the findings of IRCC-appointed physicians to conclude that Ms. Finianos's health condition might reasonably be expected to cause excessive demand on Canada's health services. It was of the view that the medical results they reported were valid because it had no other medical examination results on which to rely. Ms. Finianos did not undergo the additional examinations required, and the Canadian nephrologist who analyzed the laboratory results never examined her.

[22] However, when reviewing the H&C considerations, the IAD relied on Mr. Doss's testimony in finding that Ms. Finianos's health condition was stable and that she did not require, in the short term, specific health services beyond regular follow-up. While acknowledging that the annual costs of dialysis are high, it added that, if Ms. Finianos did eventually require care, it would not be for more than a few years in light of her advanced age.

[23] The Court does not take issue with the fact that Ms. Finianos is elderly and that any care she will require may well not be required for a long period. However, it is difficult to understand on what the IAD based its finding that any necessary care would be required only for a few years. The IAD does not seem to have taken into account the prognosis indicated in the medical reports, including the statement that Ms. Finianos may require a kidney transplant between 2022 and 2027.

[24] Mr. Doss alleges that it is [TRANSLATION] "science fiction to want to transplant new kidneys into somebody who is over the age of 80". In support of this argument, he relies on a

scientific article that refers to the life expectancies of individuals with renal failure receiving dialysis treatments or a kidney transplant, and three charts that show statistical curves.

[25] The Court notes first that the charts presented by Mr. Doss have no accompanying context or explanations that would make it possible to interpret them and draw conclusions. The article dates back to 2009, and the statistics upon which Mr. Doss relies are from 2007. Given the time that has passed and the scientific and medical advances that have since been made, the Court is of the view that more recent studies would shed more light on the life expectancy of persons affected by Ms. Finianos's illness. Moreover, a reading of the article in question indicates that physicians must assess their patients on a case-by-case basis to determine whether they are good candidates for a kidney transplant. If, as Mr. Doss suggests, there is an age limit for obtaining a kidney transplant, it is likely that the IRCC-appointed physician would have taken it into consideration in his evaluation of the demand that Ms. Finianos's health condition might place on Canada's health system. The physician who evaluated the file was aware of Ms. Finianos's advanced age. He nevertheless concluded that she would require dialysis treatments and/or a kidney transplant within five to ten years and that her health condition would cause excessive demand on Canada's health system. He does not make any suggestion that she would not be a good candidate for a kidney transplant because of her age or that, if she were to undergo dialysis treatments, it would be only for a few years. On the contrary, the physician's opinion is that these treatments would cause excessive demand on Canada's health system both financially and in terms of waiting lists. The Court is therefore of the view that the IAD's finding is not based on any up-to-date scientific evidence and is inconsistent with the sole examination results available to it.

[26] Furthermore, despite the burden he bore before the IAD, Mr. Doss presented very little evidence undermining the diagnosis, the prognosis or the demand that his mother's health condition might reasonably cause on Canada's health services. Even if it is accepted that sworn testimony is presumed to be truthful, Mr. Doss's testimony is based on conversations with his mother, who did not testify before the IAD or submit any affidavits. Mr. Doss has no medical expertise, and Ms. Finianos refused to submit to the full set of examinations required to update her file, which could have demonstrated clearly and persuasively that her heath condition had improved. The IAD's findings on Ms. Finianos's health condition are not supported by the evidence in the record and remain speculative.

[27] The Court recognizes that the IAD's decisions are entitled to a high degree of deference and that it is not for this Court to re-evaluate and weigh the evidence. However, if its conclusions on the seriousness of the demand are based on an inconsistent and irrational analysis and not based on the evidence in the record, they may have resulted in an error in the balancing of the H&C considerations against this demand, or the weighing of the seriousness of the costs associated with the required care against the principle of family reunification. While it sympathizes with Mr. Doss's desire to have his mother join him in Canada, the Court cannot presume the weight that the IAD would attribute to this demand in a new analysis or the level of H&C factors required to offset it.

[28] Because the IAD's decision lacks the hallmarks of reasonableness, the application for judicial review is allowed. The decision is set aside and the matter is referred to a differently constituted panel of the IAD for reconsideration.

[29] No question of general importance was submitted for certification, and the Court is of the view that none arises in this case.

JUDGMENT in IMM-4676-20

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed;
2. The decision of the Immigration Appeal Division dated September 16, 2020, is set aside;
3. The matter is referred to a differently constituted panel of the Immigration Appeal Division for reconsideration; and
4. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

Certified true translation
Vincent Mar

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4676-20
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