

Date: 20090129

Docket: IMM-2737-08

Citation: 2009 FC 98

Ottawa, Ontario, January 29, 2009

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

ANTONIO PAULO DEL MELO GOMES

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is a judicial review of a decision by Citizenship and Immigration Canada (CIC) rejecting the Applicant's humanitarian and compassionate (H&C) application.

II. BACKGROUND

[2] The Applicant is a citizen of Portugal, in his mid-fifties, who has been in Canada for ten years and lives with his mother who is a Canadian citizen.

[3] The Applicant has three siblings, two sisters and a brother, and an aunt in Portugal. The Applicant was living with his aunt prior to coming to Canada. The Applicant's father is deceased.

[4] The Applicant's H&C application was based upon his medical conditions which include schizoaffective disorder, Barrett's oesophagus, emphysema, and a fatty liver. He relies on his mother for financial, medical, and emotional support. His medical conditions and his reliance on his mother are the principal grounds of his H&C application.

[5] The Applicant arrived in Canada under a visitor's visa on February 26, 1998, and that visa was extended on a number of occasions up to November 27, 1999. After that, the Applicant continued to live in Canada without status.

[6] In the CIC's decision, the Officer acknowledged and outlined the Applicant's many health conditions and acknowledged that the Applicant is dependant on his mother for financial, medical, and emotional support. It was further acknowledged that the Applicant cannot work. The Applicant's limitations were supported by a family physician's assessment that the Applicant's condition would deteriorate rapidly without his mother's support.

[7] The Officer recognized that it would be preferable for the Applicant to live with a family member. He also recognized that his two sisters in Portugal were unable to provide housing or other support and that the Applicant's mother, in her advanced age, might require assistance to continue to provide the Applicant with the level of care that he required.

[8] The Officer concluded that the Applicant had sufficient ties to Portugal and would have sufficient medical care available to him such that he would not endure undeserved or disproportionate hardship due to his removal. Lastly, the Officer viewed the Applicant's decision to remain in Canada after his visitor's visa had expired as a "strong negative factor".

III. ANALYSIS

[9] I adopt Justice Dawson's rationale in *Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 646, in finding that the standard of review for an H&C decision is a deferential standard of reasonableness. This recognizes that the decision must be reasonable, and that the decision contains a significant discretionary element and is largely fact-based.

[10] This decision turns principally on the onus of proof which an applicant bears. The underlying reason for the negative decision is the failure of the Applicant to discharge the burden of proof in respect of the critical elements of the claim.

[11] The Applicant argued that many of the Officer's findings were based upon speculation. This included the ability of Portugal to provide medical care and the existence of one or more members

of the family in Portugal who could supply financial and emotional support for the Applicant. The Applicant also questioned the Officer's conclusion that the Applicant's mother may require assistance to continue to care for him in the future.

[12] The speculative elements of the decision arose as the result of the failure of the Applicant to adduce evidence to the contrary, as was his obligation. The Officer, in concluding that Portugal could provide medical care, undoubtedly took judicial notice of the fact that Portugal is a member of the EU and as such, has a reasonable medical system. The Applicant acknowledges that he provided no evidence that medical care sufficient for the Applicant was not available in Portugal. While it might have been preferable for the Officer to simply state that the Applicant had failed to discharge the onus of proof in respect of this matter, the conclusion that Portugal, on a balance of probabilities, could provide medical care was not unreasonable.

[13] With regard to the availability of family support, the Applicant failed to produce evidence that there was no family member in Portugal able to provide assistance to him. The Officer acknowledged that the two sisters were not in a position to provide housing and other support. However, in the absence of evidence regarding the two remaining members of the family being unable to provide support, the Officer concluded that some form of support was available from one or more of them. The basis for this conclusion included not only a brother, but also the aunt with whom the Applicant had lived prior to coming to Canada. Again, if the Officer had merely stated that there was no evidence that some members of the family could not care for the Applicant, the

Applicant would have no argument available to him. Given the evidence in this case and the lack of evidence produced by the Applicant, the Officer's conclusion on this point was reasonable.

[14] The Officer's conclusion with respect to the Applicant's mother potentially requiring assistance in the future was a logical conclusion to draw from the evidence of her age and circumstances. While the conclusion may be somewhat speculative, it is not unreasonable and not fatal in this instance.

[15] The Applicant also argued that the Officer did not grasp or fully understand the nature of the medical evidence. That evidence was that the Applicant required both medical care and the care of his mother in order to prevent deterioration of his condition.

[16] The difficulty with the medical evidence adduced is that it provides no details as to the nature of the condition or the prognosis for cure or control. It also does not address in any way the alternatives of medical care in Portugal or of support from close family members such as his brother and aunt in lieu of the care of the mother. It simply concludes that the existing situation is the best one, without addressing any of the alternatives.

[17] As such, it is inaccurate to describe the Officer as not having grasped the nature and import of the medical evidence. The evidence was insufficient in critical aspects of the claim for H&C consideration.

[18] Finally, the Applicant submitted that the Officer erred in putting undue weight on the lengthy period of the Applicant's illegal stay in Canada. While the Officer overstated the importance of the length of time, the true import of the Officer's comment is that the length of time in Canada cannot form a proper basis for an H&C application in these circumstances. While I find that the phrasing of the length of time being a "strong negative factor" to be erroneous and unfortunate, I find nothing wrong with the ultimate conclusion.

[19] In my view, the finding with respect to the length of time in Canada, to the extent that it may be questionable, is not fatal to the decision. It clearly did not form a critical part of the Officer's analysis.

[20] The decision, read as a whole, is reasonable in all of its major constituent parts and in its conclusion.

IV. CONCLUSION

[21] For these reasons, this application for judicial review will be dismissed. There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2737-08

STYLE OF CAUSE: ANTONIO PAULO DEL MELO GOMES

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 26, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** Phelan J.

DATED: January 29, 2009

APPEARANCES:

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