Federal Court  Cour fédérale

Date: 20091013

Docket: IMM-1290-09

Citation: 2009 FC 1026

Ottawa, Ontario, October 13, 2009

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

RAMESH ARORA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] Mr. Arora Ramesh seeks judicial review of a decision of the Immigration and Refugee Board, Immigration Appeal Division (IAD), dated February 16, 2009, in which decision the IAD concluded that Mr. Ramesh's mother was medically inadmissible to Canada and that there were insufficient humanitarian and compassionate (H&C) factors which would warrant special relief.

[2] The beginning of this judicial review was an application by Mr. Ramesh, a resident of Canada, to sponsor his parents to come to Canada from India. Mr. Madan Lal Kharbanda, as required, filed an “Application for Permanent Residence in Canada”, naming his wife, Mrs. Kamla Rani Kharbanda (Mr. Ramesh’s mother), as a “family member”.

[3] As part of the application process, Ms. Kharbanda was examined by a neurologist. The neurologist diagnosed her with Parkinson’s disease. A medical officer (on behalf of the Respondent) concluded that Ms. Kharbanda’s health condition might reasonably be expected to cause excessive demand on health services. Mr. Kharbanda was advised of this opinion and was given an opportunity to submit further evidence. In response, the family questioned the diagnosis of Parkinson’s disease and asked that H&C factors be taken into consideration. In a decision dated April 30, 2007, a visa officer advised Mr. Kharbanda that, taking into account the submissions of Mr. Kharbanda, the medical officer’s opinion was upheld and the application for permanent residence refused.

[4] Mr. Ramesh appealed this decision to the IAD. Submissions related to the medical diagnosis and the H&C factors were made and an oral hearing was held. As noted above, the IAD dismissed the appeal.

II. Issues

[5] This application raises three issues:

1. Did the IAD err by ignoring evidence that Ms. Kharbanda did not have Parkinson's disease?

2. In assessing the H&C factors, did the Board fail to weigh the evidence of the Applicant's cultural obligations to his parents?

3. Did the IAD err by failing to consider the evidence that it was not likely that Ms. Kharbanda would cause excessive demands on Canada's health and social services?

III. Statutory Scheme

[6] Mr. Ramesh, as a permanent resident of Canada, is permitted to sponsor his "family members" (as defined in s. 2(3) of the *Immigration and Refugee Protection Regulations* S.O.R./2002-227 (the *IRP Regulations*)) to come to Canada. However, each person included in the sponsorship application must meet the admissibility requirements of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (*IRPA*). Ms. Kharbanda was held inadmissible to Canada pursuant to s. 38(1)(c) of *IRPA*, which provides 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". Certain of the terms used in s. 38(1)(c) are defined in s. 1 of the *IRP Regulations*. I have included those definitions of "excessive demand", "health services" and "social services" in Appendix A to these Reasons.

[7] Mr. Ramesh was entitled to appeal the visa officer's decision to the IAD pursuant to s. 63(1) of *IRPA*. The IAD's mandate extends beyond that of the visa officer. In the context of this application for judicial review, s. 67(1) of *IRPA* permits the IAD to allow an appeal if it is satisfied that the decision appealed is "wrong in law or fact or mixed law and fact" (s. 67(1)(a)) or that sufficient H&C considerations "warrant special relief in light of all the circumstances of the case" (s. 67(1)(c)). Mr. Ramesh made submissions on both the correctness of the decision and on H&C grounds.

IV. Analysis

[8] In my view, the IAD acted reasonably in finding that there was no error in the diagnosis of Parkinson's disease. It was reasonably open to the IAD to prefer the evidence of the Respondent's neurologist over the evidence of Ms. Kharbanda's family doctor and neurologist. The Applicant's doctors opined that Ms. Kharbanda had something referred to as "benign essential tremor". I acknowledge that there was documentary evidence before the IAD showing that "essential tremor" is a medical condition that may be less serious than Parkinson's disease. However, in spite of being provided with the opportunity to directly refute the diagnosis of the Respondent's neurologist, Ms. Kharbanda's doctors did not do so. In the absence of direct medical evidence (from, for example,

another neurologist) that stated unequivocally that Ms. Kharbanda did not have Parkinson's disease, the Board did not err by preferring the clear and reliable evidence of the Respondent's neurologist.

[9] I am also not persuaded that the Board erred in its assessment of the H&C factors. The Board considered the submissions of the Applicant about his cultural obligations to his parents. After weighing all of the evidence before it, the IAD concluded that "there are insufficient humanitarian or compassionate factors which would warrant special relief". Given the deference that is owed to the IAD's decision (see, for example, *Khosa v. Canada*, 2009 SCC 12, 304 D.L.R. (4th) 1 at para. 58; *Vashishat v. Canada*, 2008 FC 1346, 337 F.T.R. 283 at para. 18), I see no reason to intervene on that issue.

[10] However, there is one area of the IAD's analysis that causes me to allow this application. That is the question of whether the IAD considered the evidence related to the costs that would be incurred by the Canadian public health system.

[11] In his decision, having concluded that Ms. Kharbanda suffered from Parkinson's disease, the medical officer opined as follows:

> The natural course of this medical condition is such that it is reasonable to expect a progressive deterioration requiring ongoing specialist management. As her disease progresses, she will require increasing assistance with her activities of daily living including feeding, personal hygiene, dressing, transfers to and from the bed, and locomotion. She will require home care and home nursing support and, as she further deteriorates, she will likely require institutional care in a nursing home.

[12] Based on this description, the medical officer concluded that her health condition "might reasonably be expected to cause excessive demand on health services". The IAD appears to have relied on this statement to conclude that Ms. Kharbanda would cause excessive demands on the public health care system. This, in my view, is not what was stated by the officer. Rather, as described, the majority of the services that may be required by Ms. Kharbanda appear to be social services rather than health services. Ongoing home care and – ultimately – nursing home care may both be accessed privately. In short, the medical officer's opinion is that Ms. Kharbanda will require the type of support that likely can be provided through private means. The Applicant directly addressed this issue by providing a letter from a person who has offered to provide such "personal support". The IAD appears to have ignored this letter and made general statements about the costs of care for a person with Parkinson's disease. No assessment was made of the individual situation faced by Ms. Kharbanda and her family.

[13] In the case of *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706 at para. 54, the Supreme Court concluded that the medical officer must assess likely demands on social services and not mere eligibility for them. As in *Hilewitz,* the family's ability and willingness to "to attenuate the burden on the public purse . . . are relevant factors" (*Hilewitz*, above at para. 61). In the case before me, no such analysis was done. Even though Ms. Kharbanda may need home care that could be provided as part of Canada's funded social services, it may be that the family is not likely to access such services. The ability and willingness of Mr. Ramesh to pay a portion of the costs of social services are relevant considerations, which, in this case, were not considered by the IAD.

[14] The Respondent submits that the case before me is distinguishable from that in *Hilewitz*, where the parents of a developmentally disabled child had made extensive arrangements for care of their child. I do not see such a distinction. The level and types of care necessary for the child in *Hilewitz* are complex and multi-faceted. The care for Ms. Kharbanda, on the other hand, appears to be comprised of home care for the foreseeable future. Mr. Ramesh provided evidence, in the form of a letter from a service-provider, that he would provide such services out of his own pocket.

[15] I am not saying that the IAD should have concluded that Ms. Kharbanda would not impose excessive demands on Canada's health and social services. It may be that a large component of her care is medical or that Mr. Ramesh cannot afford to pay for the necessary home care. On the record before me, I am simply unable to see any recognition or analysis of the type of care that the medical officer stated that she needed and the ability of Mr. Ramesh to "attenuate the burden on the public purse". As the Supreme Court held in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, in a judicial review, the court not only examines the reasonableness of the outcome. The court is also concerned "with the existence of justification, transparency and intelligibility in the decision-making process" (above, at para. 47). In this case, the decision does not meet this standard.

V. Conclusion

[16] I will allow this application for judicial review. In these Reasons, I found reasonable the medical officer's opinion that Ms. Kharbanda suffers from Parkinson's disease. However, in the re-determination that will now take place, I expect that the Applicant will also have an opportunity to present new medical evidence on the reasonableness of the diagnosis of Parkinson's disease.

[17] During the oral hearing, I neglected to ask counsel whether there was a question of general importance for certification. Accordingly, parties will have seven calendar days from the date of these Reasons for Judgment and Judgment to advise the Court of any proposed question for certification, and seven days thereafter to respond to any question proposed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is allowed, the decision of the IAD is quashed and the matter sent back for re-determination by a different panel of the IAD; and

2. Parties will have seven days from the date of these Reasons for Judgment and Judgment to propose a question of general importance for certification, and seven days thereafter to respond to any question proposed.

"Judith A. Snider"
Judge

APPENDIX A

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

PART 1

INTERPRETATION AND APPLICATION

Division 1

Interpretation

Definitions

1. (1) The definitions in this subsection apply in the Act and in these Regulations.

. . .

"excessive demand"
« fardeau excessif »

"excessive demand" means

(*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

(*b*) a demand on health 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.

Règlement sur l'immigration et la protection des réfugiés (DORS/2002-227)

PARTIE 1

DÉFINITIONS ET CHAMP D'APPLICATION

Section 1

Définitions et interprétation

Définitions

1. (1) Les définitions qui suivent s'appliquent à la Loi et au présent règlement.

. . .

« **fardeau excessif** »
"excessive demand"

« fardeau excessif » Se dit :

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) 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.

"health services" ***« services de santé »***	**« services de santé »** ***"health services"***
"health services" means any health services for which the majority of the funds are contributed by governments, including the services of family physicians, medical specialists, nurses, chiropractors and physiotherapists, laboratory services and the supply of pharmaceutical or hospital care.	« services de santé » Les services de santé dont la majeure partie sont financés par l'État, notamment les services des généralistes, des spécialistes, des infirmiers, des chiropraticiens et des physiothérapeutes, les services de laboratoire, la fourniture de médicaments et la prestation de soins hospitaliers.
"social services" ***« services sociaux »***	**« services sociaux »** ***"social services"***
"social services" means any social services, such as home care, specialized residence and residential services, special education services, social and vocational rehabilitation services, personal support services and the provision of devices related to those services,	« services sociaux » Les services sociaux — tels que les services à domicile, les services d'hébergement et services en résidence spécialisés, les services d'éducation spécialisés, les services de réadaptation sociale et professionnelle, les services de soutien personnel, ainsi que la fourniture des appareils liés à ces services :
(*a*) that are intended to assist a person in functioning physically, emotionally, socially, psychologically or vocationally; and	*a*) qui, d'une part, sont destinés à aider la personne sur les plans physique, émotif, social, psychologique ou professionnel;
(*b*) for which the majority of the funding, including funding that provides direct or indirect financial support to an assisted person, is contributed by governments, either directly or through publicly-funded agencies.	*b*) dont, d'autre part, la majeure partie sont financés par l'État directement ou par l'intermédiaire d'organismes qu'il finance, notamment au moyen d'un soutien financier direct ou indirect fourni aux particuliers.

FEDERAL COURT

SOLICITORS OF RECORD

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