Federal Court  Cour fédérale

Date: 20100114

Docket: IMM-4898-08

Citation: 2010 FC 40

BETWEEN:

SEYED MOSTAFA JAFARIAN

Applicant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION CANADA

Respondent

REASONS FOR ORDER

HARRINGTON J.

[1] Those who are qualified are welcome to immigrate to Canada; unless they are sick; except if they are rich – maybe! This is the sad case of Seyed Mostafa Jafarian, and his family.

[2] Mr. Jafarian is a foreign national, an Iranian, selected by Quebec as an investor. Unfortunately, his daughter Atousasadat is afflicted with multiple sclerosis. The visa officer came to the conclusion that the family was inadmissible because Atousasadat's condition "might reasonably

be expected to cause excessive demand on health…services", within the meaning of sections 38 and 42 of the *Immigration and Refugee Protection Act* (IRPA). This is a judicial review of that decision.

BACKGROUND

[3] As prospective permanent residents, the Jafarians were required to disclose their medical conditions. Atousasadat was diagnosed with multiple sclerosis some years ago. Although the disease is degenerative, it has been controlled by the drug Rebif. In Canada, Atousasadat's prescription would cost some $15,000 a year.

[4] The Canadian government appointed a local doctor to examine Atousasadat. That doctor's report, together with reports from Atousasadat's treating physicians, were reviewed by a Health Canada doctor who prepared a report.

[5] All this led the First Secretary, Visa Section, Embassy of Canada in Damascus, to write Mr. Jafarian to say that she had determined that Atousasadat was a person whose health might reasonably be expected to cause excessive demand. She referred to the medical diagnosis and quoted from the Health Canada doctor that Rebif "…is a very expensive drug which would be provided by provincial medical care plans." In the letter, commonly called a "fairness letter," she added that Mr. Jafarian could provide additional information relating to Atousasadat's medical condition or diagnosis and information addressing the issue of excessive demand.

[6] The concerns of the visa officer were certainly justified. Pursuant to the Regulations, Health Services include the cost of both medical personnel and prescription drugs. An “excessive demand” is one which exceeds the average annual Canadian per capita cost, which at the time was just over $5,000. However, and this is crucial to this case, a health service is one for which the majority of the funds is contributed by governments. In the “fairness letter” the visa officer declared that Atousasadat’s Rebif would be government funded. However, this is not necessarily the case, which is the subject of analysis later on in this set of reasons.

[7] Mr. Jafarian, through counsel, responded. He submitted an opinion from a doctor who specializes in the treatment of multiple sclerosis to the effect that Atousasadat’s condition would not create an excessive demand, the time limitation of which is, depending on the circumstances, five or 10 years. As to the cost of Rebif, he accepted the premise that in the normal course most of the cost thereof would be paid by the Quebec Government. He promised, however, to hold the Quebec Government harmless and even offered to set up a credit facility of $50,000, if need be. His good faith, and willingness and ability to pay, have not been challenged.

THE VISA OFFICER’S DECISION

[8] The Health Canada doctor remained of the view that Atousasadat’s condition was such that it might be reasonably be expected to cause an excessive demand. One reason was that her health might deteriorate, notwithstanding Rebif, and the second, which she characterized as her main reason, was the cost of Rebif itself.

[9] The visa officer who made the decision, who was not the same officer who sent the fairness letter, refused to issue visas. The record does not indicate that he carried out any independent analysis, particularly as regards conflicting medical opinions, or predictions, as to the progression of the disease. He simply endorsed the Health Canada doctor's opinion.

ISSUES

[10] There are four issues:

a. Would most of the cost of Rebif be government funded? If that is not the case, then the decision of the visa officer is fatally flawed;

b. If more than half the cost of Rebif would be government funded, the second issue is whether Mr. Jafarian's ability and willingness to defray the cost of out-patient prescription drug medication is a relevant consideration in assessing whether the needs presented by a family member's health condition constitutes an excessive demand;

c. The third issue, allied to the second, is whether the decision that the cost of out-patient prescription drugs might reasonably be expected to create excessive demand was reasonable; and

d. The fourth issue is whether the tenets of procedural fairness were observed in the visa officer's assessment of Atousasadat's medical condition given that the doctors were not at *idem.*

[11] As mentioned above, Mr. Jafarian's response related to how his daughter's medical condition might evolve over the next several years, coupled with an undertaking to pay for Rebif.

DOES THE GOVERNMENT PAY FOR REBIF?

[12] Although any medical care Atousasadat might require and the cost of Rebif are health services as such, they are not health services within the meaning of IRPA unless the majority of the costs thereof is government-funded.

[13] It must be kept in mind that the prime suppliers of health care services are the provinces and territories, not the federal government. The *Canada Health Act*, R.S.C. 1985, c. C-6, is essentially a mechanism by which the provinces receive funding provided that certain conditions, such as universality, are respected.

[14] However, neither the visa officer, nor the Health Canada doctor upon whose opinion he relied, nor Mr. Jafarian, actually looked at Quebec law. If they had, they would have realised that the premise that Rebif "would be provided by provincial medical care plans" is not necessarily correct.

[15] Both Mr. Jafarian and the Health Canada doctor, whose opinion was endorsed by the visa officer, relied on information provided by the Multiple Sclerosis Society. Leaving aside a small annual deductible, the health officer concluded that the cost of Rebif was Quebec government funded. Her conclusion was based on a telephone call to the MS Society.

[16] That information was incorrect. The answer lies in an *Act Respecting Prescription Drug Insurance*, R.S.Q. c.A-29.01 and regulations thereunder. In Quebec, all permanent residents must be insured to a minimum level called "the basic plan." There are two classes of underwriters: private insurance companies and the government itself. If an individual is eligible for private insurance, such insurance must be taken out. If not eligible, the public underwriter, the Régie de l'assurance médicale du Québec, provides the coverage.

[17] In accordance with the said *Act*, the *Regulation Respecting the Basic Prescription Drug Insurance Plan* and the *Regulation Respecting the List of Medications Covered by the Basic Prescription Drug Insurance Plan*, Rebif is identified as an "exceptional medication." A prescription for it must be approved by a Quebec Ministry Review Panel. Once approved, payment is covered by the basic plan be it through a private insurer or the Régie as the public insurer. Private insurers must insure on the same terms and conditions as the Régie. Unfortunately the case is in a factual vacuum because there is nothing in the record showing how the system works in practice. For instance, the Regulations do not suggest that the Régie acts as a reinsurer for private insurers when it comes to "exceptional medications."

[18] Thus the question, which was neither considered by Mr. Jafarian nor by the visa officer, is whether Mr. Jafarian and/or his daughter would, as Quebec permanent residents, be eligible to take out private insurance.

[19] Under the Quebec *Act*, the Régie must provide coverage for persons of a certain age or in financial need. Mr. Jafarian and his family do not qualify. Section 15, however, of the *Act* goes on to provide that the Régie, in default, must provide coverage for "all other eligible members who are not required to become members of a group insurance contract or employee benefit plan applicable to a group with private coverage…" Such groups include those belonging to a professional order, trade or occupation, and union or an association of employees that offers group insurance coverage, or an employee benefit plan.

[20] An additional complication is that Atousasadat turned 18 as the visa officer was considering the application. The Quebec *Act* provides that children under 18, along with children between 18 and 25 who meet certain conditions, such as being enrolled in a full-time study program, being unmarried, etc. must be covered by a parent's private insurance if a parent has private insurance. Adult children outside those conditions must, like all Quebec residents, register for a private plan if eligible for one, or be covered by the Régie. When a child, like in this case, is going to turn 18 during the application process or within the five or ten-year time period used to assess excessive demand, this child's ability to remain covered by a parent's private plan and/or obtain her own private coverage during the applicable period must be considered. Perhaps she would attend university and as a student enrol in a group plan.

[21] All we know is that Mr. Jafarian has been approved as an investor. Because the right questions were not asked, there is no indication whatsoever in the record as to whether Atousasadat's medication would be paid for by private insurance. If it would be, then the majority

of the cost of Rebif would not be government-funded and so the cost thereof would not be an "excessive demand" within the meaning of IRPA.

WILLINGNESS AND ABILITY TO PAY

[22] The next issue, in the event that Atousasadat would not have private prescription drug coverage, is whether Mr. Jafarian's ability and willingness to pay for her medication are relevant considerations. The Minister submits they are not. Although on the facts of this case that position is correct, a visa officer is required to take a far more nuanced approach.

[23] For the reasons I expressed in *Companioni v. Minister of Citizenship and Immigration*, 2009 FC 1315, the principles enunciated by the Supreme Court in *Hilewitz v. Canada (Minister of Citizenship and Immigration)*; *DeJong v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706, although expressly limited to social services, are equally applicable to prescription drugs and other health services as long as the majority of the funds for the prescription drug in question are not contributed by governments. The Court held that assessments must be individualized and take into account not merely eligibility for services, but also likely demand as well as the applicant's ability and intention to pay.

[24] Although ability and willingness on the part of the applicant to pay for social services were held in *Hilewitz* to be relevant factors, Madam Justice Abella noted that social services are regulated by provincial statutes, and went on to add, at paragraph 69, that

> [the] Ontario legislation manifestly contemplates the possibility of financial contributions from families able to make them. Even if the

> Hilewitz and de Jong families' stated intentions regarding education and training did not materialize, the financial resources of both families are such that they likely would be required to contribute a substantial portion, if not the entirety, of the costs associated with certain social services provided by the province.

Hence, in *Hilewitz* the applicants were, in any event, obliged to pay, given their financial status, no matter what they had promised.

[25] One of the relevant factors in this case is whether Mr. Jafarian has the legal right to pay for his daughter's Rebif. An undertaking not to call upon the government to pay what it is obliged to pay under statute is simply not enforceable. This principle was clearly set out by Mr. Justice Evans, speaking for the Court of Appeal, in *Deol v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 271, [2003] 1 F.C. 301, and by Mr. Justice Campbell in *Lee v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1461.

[26] This position was contested in that it was submitted on behalf of Mr. Jafarian that if he reneged on his undertaking there would be a misrepresentation which could lead to his removal in accordance with section 40 and following of IRPA. I find this submission distasteful. Canada has the right to determine who is admissible as an immigrant and who is not (*Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 at paras. 24-27 and *Hilewitz*, at para. 57). However, once those qualifications are met, it would be contrary to public policy, and to all that Canadians hold dear, to discriminate against the Jafarians with respect to health services and in effect to treat them as second class. All Canadian permanent residents are entitled to universal health care.

[27] Furthermore, Quebec could not possibly act on Mr. Jafarian's representation, as that would run contrary to Quebec law, as well as to the funding arrangements and health care policy as set out in the *Canada Health Act*. The primary objective of our health care policy is to facilitate reasonable access to health services without financial or other barriers. In order for a province to qualify for a full cash contribution from the federal government, its plan must, among other things, be universal and accessible to all residents.

[28] These circumstances are quite unlike *Hilewitz*, where, as a matter of Ontario law, the cost of most if not all of the social services in question were recoverable, irrespective of Mr. Hilewitz's representations. If the majority of the cost of Rebif is not covered by the Quebec government, this issue is moot. If the majority is so covered, then his intentions, and good faith, are simply not relevant. The law does not permit him to opt out. If this latter scenario is the case, the refusal to grant permanent resident visas to Mr. Jafarian and his family was correct in law.

PROCEDURAL FAIRNESS

[29] A good deal of oral argument centered on the apparent difference of opinion among the doctors as to the extent, if any, Atousasadat's health would deteriorate over the next several years, notwithstanding that she is taking Rebif. If it was reasonable to project deterioration it appears likely that the required medical attention and hospital care would constitute an "excessive demand." The Health Canada doctor accentuated the negative, while others accentuated the positive. Perhaps her

opinion was reasonable, perhaps not. However the decision was not hers to make. The decision was the visa officer's and he abrogated his responsibility.

[30] While it is difficult to reach a decision in a matter in which one is not expert, IRPA makes this demand of visa officers, and they cannot shirk their responsibility. The underlying principle was set out by Lord Denning M.R. in *Selvarajan v. Race Relations Board*, [1976] 1 All. E.R. 12 (C.A.) where he said at page 19:

> In recent years we have had to consider the procedure of many bodies who are required to make an investigation and form an opinion .... In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. <u>But, in the end, the investigating body itself must come to its own decision and make its own report.</u>
>
> [Emphasis added.]

[31] This approach was approved by the Supreme Court in *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879.

[32] I subscribe to the view set out by Mr. Justice Cullen in *Poste v. Canada (Minister of Citizenship and Immigration)* (1997), 140 F.T.R. 126, 42 Imm. L.R. (2d) 84. Mr. Poste and his family were denied permanent resident status because one of his sons had a mental disability. The Minister held that the family would make excessive demands on Canadian social services. Mr. Poste's argument was that the medical officer's report relied upon by the decision maker was unreasonable and that the visa officer was personally obliged to assess the reasonableness of that opinion. According to Mr. Justice Cullen:

> [60] The applicant was requested to provide three expert reports to Immigration regarding Matthew. It seems that a decision was made as to the medical inadmissibility of Matthew on the basis of only of the reports submitted, which happened to be the least favourable report. There is an indication that Immigration officials may have refused to consider the two other reports requested of the applicant -- which reports were more favourable to Matthew.
>
> [61] When a government body such as Immigration requests information of an individual, it is duty-bound to consider that information when received. This is especially so in the case where the information requested is in the form of expert opinion, which is time-consuming as well as costly to acquire. If a decision is rendered that runs contrary to the information requested, the decision maker must at least make reference to the contrary information, and account for its rejection. To be put bluntly, if Immigration requests certain medical reports, receives two positive medical reports and one negative report, and a medical assessment is rendered apparently solely on the negative medical report, reasons must be given as to why the positive reports are absent from the analysis. Even if the decision makers had considered the requested information, and had placed it in the context of all the circumstances of the case, there is nothing on the face of the record communicated to the applicant to indicate that consideration of the favourable material was seriously made. There is no appearance of justice. The decision makers thus failed the applicant in these basic duties of procedural fairness and natural justice in this case.
>
> [Emphasis added.]

CERTIFIED QUESTION

[33] For these reasons, the application for judicial review shall be granted.

[34] The Minister shall have until January 26, 2010 to propose a certified question which would support an appeal to the Federal Court of Appeal, and Mr. Jafarian shall have until February 2, 2010 to reply.

"Sean Harrington"
Judge

Ottawa, Ontario
January 14, 2010

FEDERAL COURT

SOLICITORS OF RECORD

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