Federal Court  Cour fédérale

Date: 20100216

Docket: IMM-4737-08

Citation: 2010 FC 157

Toronto, Ontario, February 16, 2010

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

AL-KARIM EBRAHIM RASHID

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of the decision made on September 18, 2008 at the High Commission of Canada in Nairobi, Kenya, by visa officer C. Glover who found the applicant to be medically inadmissible to Canada. For the reasons that follow, the application will be dismissed.

Background

[2] Mr. Al-Karim Ebrahim Rashid, the applicant, applied for a permanent resident visa under the Federal Skilled Worker Program at the High Commission in Nairobi, Kenya, on January 13, 2004.

[3] The applicant is HIV positive and asymptomatic, meaning the virus is present but does not manifest any visible symptoms. He contracted HIV in 1996 from contaminated blood in Tanzania.

[4] The High Commission found that while the applicant had met the requirements of the Federal Skilled Worker Program, he was inadmissible pursuant to subsection 38(1) of the IRPA. A medical officer determined that the costs of the treatment required for the applicant's condition would likely exceed the amount spent on the average Canadian and would delay or deny provision of those services to those in Canada who might need them.

[5] In reply to the medical officer's findings, the applicant submitted additional documents on March 21, 2007 and on May 1, 2008. These documents consisted of statements of the applicant's financial resources, a letter of support and financial documents from the applicant's sister who agreed to support him for his first five years in Canada, letters from two Canadian doctors who also agreed to contribute to his support and a medical report from the Aga Khan Hospital in Nairobi.

[6] In September 2008, medical officer Dr. Kerry Kennedy reviewed the additional documents and concluded that the information provided by the applicant did not alter the opinion that the applicant's admission to Canada might reasonably be expected to cause excessive demand on health services.

[7] Acknowledging that some HIV-infected applicants will not cross the threshold for excessive demand and thereby qualify for admittance into Canada, Dr. Kennedy found that Mr. Rashid was on a regimen of medication that cost about USD 10,000.00 per year. There is no dispute between the parties that this amount is well in excess of the health cost threshold.

[8] Dr. Kennedy also found that should Mr. Rashid's positive response to the medication diminish, he would likely be placed on newer anti-viral medications which are, generally, as expensive or more expensive that the drugs that he is presently taking.

Decision Under Review

[9] On September 18, 2008, the visa officer found that the applicant was medically inadmissible to Canada and rejected his visa application. The visa officer's letter, dated September 18, 2009, constitutes his reasons for decision together with Computer Assisted Immigration Processing System notes, dated September 16-17, 2008.

Issues

[10] The sole issue is whether the visa officer's decision, through the assessment of the medical officer, constitutes a reasonable finding that the applicant is inadmissible pursuant to paragraph 38(1) (c) of the IRPA.

Analysis

[11] Several decisions of this Court have held that *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, has not changed the law in respect of factual findings subject to the limitation in paragraph 18.1(4)(d) of the *Federal Courts Act*: *De Medeiros v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 386, [2008] F.C.J. No. 509; *Obeid v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 503, [2008] F.C.J. No. 633; *Naumets v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 522, [2008] F.C.J. No. 655.

[12] It has also been held that a tribunal's decision concerning questions of fact is reviewable upon the standard of reasonableness: *Sukhu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 427, [2008] F.C.J. No. 515, see also *Navarro v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 358, [2008] F.C.J. No. 463, at paras. 11-15.

[13] The visa officer's factually intensive analysis and application of discretion are central to the officer's role as a trier of fact. As such, these findings are to be given significant deference by the

reviewing Court. The visa officer's factual findings should stand unless the reasoning process was flawed and the resulting decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir*, *supra*, at para. 47.

[14] In *Gao v. Canada (Minister of Employment and Immigration)*, (1993), 61 F.T.R. 65, [1993] F.C.J. No. 114, at pp. 317-318, Justice Dubé had discussed the standard of review of a finding of fact made by a medical officer in the following terms:

> Most of the case law relating to medical inadmissibility decisions by visa or Immigration Officers has issued from appellate bodies. The general principles arising from these cases are of course relevant to a judicial review application seeking to quash an Immigration Officer's decision.
>
> The governing principle arising from this body of jurisprudence is that reviewing or appellate courts are not competent to make findings of fact related to the medical diagnosis, but are competent to review the evidence to determine whether the medical officers' opinion is reasonable in the circumstances of the case. *Canada (M.E.I.) v. Jiwanpuri* (1990), 109 N.R. 293 (F.C.A.). The reasonableness of a medical opinion is to be assessed not only as of the time it was given, but also as of the time it was relied upon by the Immigration Officer, since it is that decision which is being reviewed or appealed, *Jiwanpuri*. The grounds of unreasonableness include incoherence or inconsistency, absence of supporting evidence, failure to consider cogent evidence, or failure to consider the factors stipulated in section 22 of the Regulations. [some citations removed].

[15] In *Barnash v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 842, [2009] F.C.J. No. 990, at para. 20, Justice Mandamin referred to *Gao* in holding that given the specialized

nature of the medical officer's opinion, reasonableness is the appropriate standard of review for the factual component of the decision. I agree with that conclusion.

[16] No deference is due if the Court determines that an administrative decision-maker has failed to adhere to the principles of procedural fairness: *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at para. 100. Such matters continue to fall within the supervising function of the Court on judicial review: *Dunsmuir*, *supra*, at paras. 129 and 151.

[17] In a case such as this one, there might be more than one reasonable outcome. However, as long as the process adopted by the visa officer and its outcome fits comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12, para. 59.

[18] Mr. Rashid relies on the Supreme Court of Canada's decision in *Hilewitz v. Canada (Minister of Citizenship and Immigration); De Jong v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] S.C.J. No. 58 (*Hilewitz*) to argue that, as in the case of social services, a person in the applicant's position can pay for his own medical health services: in this case, the cost of out-patient prescription anti-viral drugs.

[19] Noting that Justice Campbell found a distinction between social and health services, in *Lee v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1461, [2006] F.C.J. No. 1841, the

respondent submits that the *Hilewitz* principles cannot be read as automatically extending to the health services context as the applicant suggests: *Lee*, at para. 6.

[20] Justice Harrington recently held in *Companioni v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1315, [2009] F.C.J. No. 1688, at paragraph 10, that *Hilewitz* was equally applicable to any consideration as to whether the cost of out-patient drugs would constitute an excessive demand on health services. He considered that the Minister's reliance, in that case, on the decision of the Federal Court of Appeal in *Deol v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 271, [2003] 1 F.C. 301 as supporting a general principle that ability to pay for health services should never be considered, was misplaced.

[21] Justice Harrington found, however, that there was a fundamental distinction between social services, the cost of which the province was entitled to recover, as a matter of law, from those who can afford to pay and the supply of out-patient drugs. In Ontario, by virtue of the provincial Trillium Drug Program, most of the cost of the drugs in question would be paid by the province. The visa officer had properly considered that factor but had failed, in conducting the personalized assessment required by *Hilewitz*, to determine whether the applicant had a viable plan to cover the costs, such as a personal insurance plan or an employer-based group policy. For that reason, the application was granted and the matter was sent back for reconsideration: *Companioni*, above, at para. 27.

[22] In the case of Mr. Rashid, I am not satisfied that the applicant has met the burden of demonstrating that the visa officer, through the medical officer's assessment, made an erroneous

finding: *Vazirizadeh v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 807, [2009] F.C.J. No. 919, at para. 26.

[23] The facts of this matter are distinguishable from those in *Companioni*, in my view. In that case, one of the two applicants had a personal insurance policy that covered prescription drug costs and the second was covered by an employer-based group policy, either or both of which might have continued to apply if the applicants relocated to Canada. In the present matter, the applicant is relying on the personal commitments of his sister and two others. It is trite law that they can't be held to those commitments: *Companioni*, at para. 30. As stated by Justice Evans for the Federal Court of Appeal in *Deol*, above, at paragraph 46:

> 46 … As has been held in several previous cases, it is not possible to enforce a personal undertaking to pay for health services that may be required after a person has been admitted to Canada as a permanent resident, if the services are available without payment. The Minister has no power to admit a person as a permanent resident on the condition that the person either does not make a claim on the health insurance plans in the provinces, or promises to reimburse the costs of any services required. See, for example, *Choi v. Canada (Minister of Citizenship and Immigration)*, (1995), 98 F.T.R. 308 at para. 30; *Cabaldon v. Canada (Minister of Citizenship and Immigration)*, (1998), 140 F.T.R. 296 at para. 8; *Poon*, supra, at paras. 18-19. [My Emphasis]

[24] Mr. Rashid would be eligible for coverage under the provincial Trillium Drug Program if he was to become resident in Ontario, as intended, once a valid Ontario Health Card is issued to him and upon demonstrating high prescription drug costs in relation to his net household income.

[25] The visa officer did not ignore the new financial support documents submitted by the applicant in March 2007 and May 2008, nor did the medical officer make any unreasonable error of fact when he found that the new documents did not change the notification of medical inadmissibility previously signed by his colleague. The medical officer's opinion, adopted by the visa officer, that the estimated cost of Mr. Rashid's medication would be well in excess of the health cost threshold and that it would constitute an excessive demand was a personalized assessment based on the evidence.

[26] Even if I were to find that the visa officer did err in assessing the applicant's financial ability to pay for his own prescription drugs, this is not a case in which it would be appropriate to send the matter back to a different visa officer for reconsideration. The plan that was put forward by the applicant was based upon personal commitments to pay for the required health services. Given the non-enforceability of those commitments and the expected eligibility of the applicant under Ontario's Trillium Drug Program, I do not see how a different visa officer could reach any other conclusion than excessive demand in this case.

[27] I conclude that the visa officer's determination that the applicant does not meet the requirements for immigration to Canada, pursuant to paragraph 38(1)(c) of the IRPA, was reasonable and within the range of possible and acceptable outcomes: *Dunsmuir*, *supra*, at para. 47.

[28] As I find the overall result in this case to be reasonable, and given the specialized nature of the medical officer's opinion in this case, it is not open to this reviewing court to substitute its own

view of a preferable outcome: *Dunsmuir*, *supra*, at para. 47; *Barnash*, *supra*, at para. 20; *Khosa*, *supra*, at para. 59. Accordingly, this application will be dismissed.

[29] The parties were given an opportunity to propose questions for certification. As set out in paragraph 74(d) of the IRPA and Rule 18(1) of the *Federal Courts Immigration and Refugee Protection Rules* / SOR 93-22, as amended, there can be no appeal of this decision if the Court does not certify a question.

[30] The applicant submits that the question certified by Justice Harrington in *Companioni*, above, should also be certified in this application for judicial review. That question is as follows:

> *Is the ability and willingness of applicants to defray the cost of their out-patient prescription drug medication (in keeping with the provincial/territorial regulations regulating the government payment of prescription drugs) a relevant consideration in assessing whether the demands presented by an applicant's health condition constitute an excessive demand?*

[31] The respondent submits the following question for certification:

> *When a medical officer has determined that an applicant will be in need of prescription drugs, the cost of which would place the applicant over the threshold of "excessive demand" as set out in the Immigration and Refugee Protection Regulations, must a visa officer assess the applicant's ability to pay for the prescription drugs privately when those same drugs are covered by a government program for which the applicant would be eligible in the province/territory of intended residence?*

[32] In *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] F.C.J. No. 368, the threshold for certification was articulated by the Federal Court of Appeal as: "is there a serious question of general importance which would be dispositive of an appeal" (paragraph 11).

[33] In *Kunkel v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 347, [2009] F.C.J. No. 170, at para. 8, citing its 2006 decision in *Boni v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 68, [2006] F.C.J. No. 275, at para.10, the Federal Court of Appeal determined that a certified question must lend itself to a generic approach leading to an answer of general application. That is, the question must transcend the particular context in which it arose.

[34] In *Boni*, *supra*, the Federal Court of Appeal stated that “it would not be appropriate for the Court to answer the certified question because the answer would not do anything for the outcome of the case (*Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, [1994] F.C.J. No. 1637, (1994) 176 N.R. 4).”

[35] I am of the view, in light of the particular facts in this case, that the certification of a question on the applicant’s ability and willingness to defray the cost of his anti-viral medication would not meet the test articulated in *Kunkel* and *Boni* and would not be dispositive of an appeal. Such a question would not lend itself to a generic approach leading to an answer of general application.

[36] In contrast, the respondent's proposed question lends itself to a generic approach leading to an answer of general application as it is not focused on the ability and willingness of the applicant to defray the cost of his current drug regimen. The question addresses the duty of the visa officer to assess the applicant's ability to pay for the prescription drugs privately when those same drugs are covered by a government program. The answer would be dispositive of an appeal and transcends the particular context in which it arose.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is dismissed. The following question is certified:

> When a medical officer has determined that an applicant will be in need of prescription drugs, the cost of which would place the applicant over the threshold of "excessive demand" as set out in the *Immigration and Refugee Protection Regulations*, must a visa officer assess the applicant's ability to pay for the prescription drugs privately when those same drugs are covered by a government program for which the applicant would be eligible in the province/territory of intended residence?

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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