Federal Court  Cour fédérale

Date: 20110310

Docket: IMM-4711-10

Citation: 2011 FC 286

Toronto, Ontario, March 10, 2011

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

MOHANIE HEMNATH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Ms. Hemnath immigrated from Guyana and is now a Canadian citizen. Her application to sponsor her parents and sister was rejected on the grounds that her sister is medically inadmissible. According to the *Citizenship and Immigration Canada Medical Notification* on file, her health condition, "medical retardation", might reasonably be expected to cause excessive demand on social services, the cost of which would likely exceed the average Canadian per capita cost over five years, and would add to existing waiting lists and delay or deny those services to those already in Canada and in need. The applicant's sister was therefore found inadmissible under section 38(1) (*c)* of the

Immigration and Refugee Protection Act (IRPA). Since Ms. Hemnath is a citizen, she was entitled to appeal the visa officer's negative decision to the Immigration Appeal Division (IAD) of the Immigration and Refugee Protection Board of Canada in accordance with section 67 of IRPA. However the appeal was explicitly limited to humanitarian and compassionate considerations. The determination that her sister was otherwise medically inadmissible was not challenged.

[2] The IAD dismissed her appeal. This is the judicial review of that decision.

[3] In the narrative of the Medical Notification, it is stated that the sister has been diagnosed with moderate to severe mental retardation and has a history of cerebral policy and infantile encephalopathy since birth. She has delayed milestones in all spheres, has never been to school, cannot read or write, and emits sounds and shows hand signals to respond yes or no. She cannot live independently and requires continuous supervision.

[4] Part of this appeal focused on cerebral palsy and treatment thereof. However, I must say that it a side issue because in the medical condition column of the Medical Notification the doctor inserted "mental retardation" not "cerebral palsy".

[5] The doctor had stated that our social philosophy with respect to individuals in a state of dependence associated with mental retardation is to promote community living with extensive community based social support, and the sister would also benefit from Adult Day Programs such as community access and use, behavioural support and leisure/recreational community activities. As a permanent resident she would be able to access support independent living programs and her

family members or caregivers would be eligible for respite care, which is both expensive and in high demand, which would give them needed time off from the demands from caring for a person with cognitive impairment. There is a shortage in Canada of such social services.

[6] Ms. Hemnath submits that were her sister to live in Canada, the situation would be as it is now. Her mother is a stay-at-home mom. There is, however, no undertaking not to take advantage of programs available in Canada, and indeed it is quite likely that such an undertaking would not be enforceable.

[7] The applicant did not appear to appreciate the respite program, its availability and its strain on the public purse.

[8] The IAD took all these factors carefully into account. Criticism was levied at the fact that in the first paragraph of the IAD's reasons the member said that Ms. Hemnath's father was a resident and citizen of Jamaica, not Guyana. This was clearly a clerical error as otherwise Guyana is mentioned throughout the reasons.

[9] Reference was also made to the father's checkered immigration history in Canada. The record indicates, however, it is indeed checkered in that he came to Canada in 2000 on a false passport; and after his refugee claim was dismissed did not leave in a timely manner. He needs ministerial approval to return, and the fact that he was permitted to come subsequently on a visitor's visa to attend a family funeral has no bearing on whether he should be granted permanent resident status.

[10] The IAD concludes at paragraph 21:

> In this case the daughter has been cared for by her parents since birth. Upon a careful consideration of all of the evidence the panel finds that the extent and severity of the daughter's medical condition, the applicant's checkered immigration history and the appellant's inability to produce significant evidence relating to those social services which the daughter may require in Canada outweigh the sincere desire the applicant and some members of her family have to provide assistance, care and comfort to her father, mother and sister and their being victimized criminally in the past.

[11] Although this is a hard case, it must be borne in mind that it is not my decision to make. My duty is to determine whether or not the decision was reasonable. As Mr. Justice Iacobucci stated in *Canada (Director of investigation and Research) v Southam Inc.*, [1997] 1 SCR 748, at paragraph 80:

> I wish to observe, by way of concluding my discussion of this issue, that a reviewer, and even one who has embarked upon review on a standard of reasonableness *simpliciter*, will often be tempted to find some way to intervene when the reviewer him- or herself would have come to a conclusion opposite to the tribunal's. Appellate courts must resist such temptations. My statement that I might not have come to the same conclusion as the Tribunal should not be taken as an invitation to appellate courts to intervene in cases such as this one but rather as a caution against such intervention and a call for restraint. Judicial restraint is needed if a cohesive, rational, and, I believe, sensible system of judicial review is to be fashioned.

[12] In my view, the reasonableness of the IAD's decision is fully defensible in light of the principles stated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, particularly at paragraph 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result.

> Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[13] There is no serious question of general importance to certify.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.

2. There is no serious question of general importance to certify.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4711-10
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