Federal Court  Cour fédérale

Date: 20120227

Docket: IMM-3590-11

Citation: 2012 FC 261

Ottawa, Ontario, February 27, 2012

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

JOEL RAVIS CUARTE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, a citizen of Philippines, challenges the legality of the refusal of his application for permanent residence. Based on the medical officer's opinion, the immigration officer found that the applicant's oldest son, Jethro, having been diagnosed with global developmental delay, "might reasonably be expected to cause excessive demand on health or social services" within the meaning of paragraph 38(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Because of Jethro's inadmissibility, his parents and two brothers are inadmissible in Canada as well (subsection 42(a) of the *IRPA*).

[3] For the reasons that follow, this application for judicial review shall be granted by the Court.

FACTUAL BACKGROUND

[4] The applicant is currently employed as a designer with an architecture firm in Saskatoon. He applied to the Saskatchewan Immigration Nominee Program [SINP] and was nominated under the Skilled Worker Category. He subsequently applied for permanent residence in Canada. His wife and three sons are included in this application as dependent family members.

[5] On November 16, 2010, the applicant received a first letter [the fairness letter] from the immigration officer advising him that Jethro had been determined to be a person whose health condition might reasonably be expected to place an excessive demand on social services in Canada due to his need for special education services.

[6] The fairness letter indicated that "an excessive demand is a demand for which the anticipated costs exceed the average Canadian per capita health and social services costs, which is currently set at $4,806 per year", and that Jethro's condition required "special education services in Saskatchewan: as per Greg Chapman [*sic*], Superintendent of Finance [*sic*], corresponds to level 2 with additional allocation of $13,000 per year".

[7] In fact, a letter from Greg Chatlain, Superintendent of Education from Greater Saskatoon Catholic School, indicated that public funding for Special Education Services in Saskatchewan stands at $13,000 per year on an average basis. The applicant was thus invited to submit additional information regarding an individualized plan to ensure that there would be no excessive demand.

[8] In January of 2011, the applicant submitted a letter outlining the family's plan to mitigate any excessive demand that might be caused by Jethro's condition, to which the applicant attached a personal declaration of ability and intention to pay. The letter outlined various non-governmental services that are available for Jethro, as well as the family's plan to minimize his medical and educational expenses.

[9] On March 21, 2011, the applicant received a further letter asking him to provide evidence that there was a mechanism in place allowing reimbursement of publicly funded education services to the Saskatchewan Ministry of Education.

IMPUGNED DECISION

[10] By letter dated April 20, 2011, the applicant was informed that upon review of the material submitted, the immigration officer had made the final determination that Jethro was inadmissible in Canada pursuant to paragraph 38(1)(c) of the *IPRA*.

[11] Although not specified in the refusal letter of the immigrant officer, the determinative issue appears to be the existence of a mechanism of reimbursement of publicly funded education services in Saskatchewan. According to the CAIPS notes dated April 18, 2011, the officer was not satisfied

that, in absence of such mechanism, the applicant will reimburse the province of Saskatchewan for the special education services provided to his son.

ISSUES AND STANDARD OF REVIEW

[12] The applicant challenges the legality of the decision made by the immigration officer on the basis that:

a. The medical officer erred in determining the expected costs imposed by Jethro's medical condition, falling short of the individualized assessment called for by the jurisprudence;
b. It was unreasonable for the medical officer and the immigration officer to insist on the availability of a mechanism for the reimbursement of costs expended for special education services; and,
c. The immigration officer failed to comply with the obligation to notify the province of Saskatchewan of a potential refusal of a provincial nominee.

[13] Both parties agree that the applicable standard of review with respect to the applicant's first and third allegations is correctness. The first relates to the immigration officer's obligation, as per *Hilewitz v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 SCR 706 [*Hilewitz*], to conduct an "individualized assessment" of the expected medical and social services costs: *Sapru v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 35 at paras 25-27, [2011] FCJ 148. The third concerns procedural fairness.

[14] As far as the second allegation is concerned, the respondent argues that it should be reviewed against the standard of reasonableness as it questions the immigration officer's findings of

fact with respect to the assessment (*Chauhdry v Canada (Minister of Citizenship and Immigration)*, 2011 FC 22 at para 14). Be that as it may, the applicant is already arguing that the immigration officer's demand for evidence of a mechanism for reimbursement of excessive costs was unreasonable. I have resorted to review this issue on the standard of reasonableness, while noting that it involves at least a mixed question of fact and law, and to some extent, a question of law, as far as the existence of a mechanism for reimbursement constitutes a legal requirement.

OBLIGATION TO CONDUCT AN INDIVIDUALIZED ASSESSMENT

[15] In *Hilewitz*, Justice Abella, writing for the majority of the Supreme Court of Canada, made clear that the assessment required for making an inadmissibility determination under subparagraph 19(1)(a)(ii) of the former *IRPA*, now replaced by its paragraph 38(1)(c), is an assessment of the needs of the individual rather than those of the needs of a person belonging to a more or less precisely identified group of persons suffering from the same health impairment.

> Section 19(1)(a)(ii) calls for an assessment of whether an applicant's health would cause or might reasonably be expected to cause excessive demands on Canada's social services. The term "excessive demands" is inherently evaluative and comparative. Without consideration of an applicant's ability and intention to pay for social services, it is impossible to determine realistically what "demands" will be made on Ontario's social services. The wording of the provision shows that medical officers must assess likely demands on social services, not mere eligibility for them.
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> To do so, the medical officers must necessarily take into account both medical and non-medical factors, such as the availability, scarcity or cost of publicly funded services, along with the willingness and ability of the applicant to pay for the services.
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> This, it seems to me, requires individualized assessments. It is impossible, for example, to determine the "nature", "severity" or probable "duration" of a health impairment without doing so in relation to a given individual. If the medical officer considers the need for potential services based only on the classification of the

> impairment rather than on its particular manifestation, the assessment becomes generic rather than individual. It is an approach which attaches a cost assessment to the disability rather than to the individual. This in turn results in an automatic exclusion for all individuals with a particular disability, even those whose admission would not cause, or would not reasonably be expected to cause, excessive demand on public funds.
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> [Emphasis added]

[16] Also, in the recent case of *Perez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1336, [2011] FCJ 1638, the Court decided that the officer did not comply with his obligation of individual assessment by failing to evaluate the needs of an applicant "as an individual, taking into account his particular situation, but rather as a member of a class of persons", in that case, deaf people.

[17] The applicant contends that the medical officer did not conduct an individualized assessment of Jethro's needs and costs associated with them. Instead, he limited his assessment to merely determining that Jethro required special education services in Saskatchewan, which services purportedly cost some $13,000 per year for the provincial Crown.

[18] The respondent contends that the medical officer's assessment of Jethro's likely demands or costs has been enough individualized because Jethro is now registered at St. Marguerite Catholic School in Saskatoon where he receives special education services. The medical officer therefore used the appropriate figures available in assessing Jethro's individual needs as it is certain that he will continue to require in the future the same services that he does now.

[19] More particularly, the respondent submits that the average of $13,000 corresponds to the amount of funding provided for level 2 special education services per year by the provincial Crown. The respondent argues that despite the fact that Jethro's specific needs might be somewhat more or less than another student, the actual cost on public funds will be $13,000 as this is the amount that will be provided to his school on his behalf. This argument directly goes against the teachings of the Supreme Court in *Hilewitz*. Again, what needs to be assessed is the services that the patient can be expected to require and receive, not what will be available or allocated on his behalf, hence the necessity to take into consideration the applicant's ability and intention to pay for the required services.

[20] The figure of $13,000 per year corresponds to an average, on a per capital basis, of public funding indistinctly attributed by the province of Saskatchewan to groups of individuals, irrespective of the differences in their medical file, health condition and problematic in terms of the type of special education services they each individually require. However, nothing in the CAIPS notes indicate that there has been an assessment of whether Jethro would be expected to use less than, more than, or exactly the average amount of funding provided for level 2 special education service per year by the province. Thus, I entirely agree with the applicant that the medical officer's assessment, on which the inadmissibility determination was based, falls short of the individualized assessment called for by the Supreme Court in *Hilewitz*, above, at paras 54-56.

[21] In the final analysis, I am not satisfied that the immigration officer made a sufficiently individualized assessment of Jethro's educational costs when he found that Jethro's demands equate, and will continue to equate, to "level 2 special education services". This is a generalized

assessment as there is no indication of individualized “evaluation and comparison” in the impugned decision (*Hilewitz*, above, at para 54). Moreover, I note that the funding offered by the province to the educational boards is a global source of revenues for them, and there is absolutely no way to determine in which way the money allocated to an educational board is actually spent by each local school, neither to establish the actual cost of the “demands” with respect to the particular problematic of Jethro. In this regard, the applicant states in his affidavit that the Principal of St. Marguerite School has noted great gains and significant progress in Jethro’s development since he attends the school, leaving open the question of anticipated demands for the following years to come.

[22] Despite the fact that the lack of individualized assessment is determinative and constitutes sufficient ground to set aside the impugned decision, I will nevertheless examine the two other allegations made by the applicant since the matter has to be redetermined by another immigration officer. With respect to the second allegation, for the reasons below, the Court finds that the immigration officer unreasonably required evidence of the existence of reimbursement of mechanism. As far the Canada-Saskatchewan agreement is concerned, the Court dismisses the third allegation that the prior notification in this case was obligatory.

ABSENCE OF A REIMBURSEMENT MECHANISM

[23] In his letter, Greg Chatlain states that Greater Saskatoon Catholic Schools are publicly funded and operate under the provisions of the *Education Act*, 1995, SS 1995, c E-0.2. The Saskatchewan *Education Act* does not establish a reimbursement mechanism in the circumstances

of the applicant. However, it is possible to voluntarily enter into an agreement with the school board to contribute in the applicant's son expenses.

[24] I have considered the respondent's submission that in determining whether an individual is susceptible to place excessive demands, the immigration officer was required to assess not only the intent but the ability to pay for such services. However, the respondent's correlative argument is circular and relies on the following sophism: because there is no reimbursement mechanism, the applicant has not proven his ability to pay for the costs of the special education services. Here, the immigration officer failed to adequately consider the applicant's declaration of intent and ability to pay by relying solely on the absence of a mechanism for reimbursement.

[25] From what I can read in the impugned decisions and the CAIPS notes, it is clear that the respondent is reading into the reasons provided by the immigration officer. Nowhere in these reasons does the immigration officer explicitly question the applicant's ability to pay and, indeed, the respondent admits that there is no legal prohibition for an individual to conclude a voluntary agreement with the education board for the reimbursement of special educational services.

[26] As per *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190, "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". Thus, I conclude that the overall reasoning of the immigration officer to deny the application

on the basis that reimbursement mechanism must exist in the first place is also unreasonable, and this latter finding renders the whole decision reviewable as well.

THE CANADA-SASKATCHEWAN AGREEMENT

[27] Lastly, the applicant contends that the immigration officer's decision should be quashed because notice was not provided to the province of Saskatchewan of the refusal of one of its nominees in accordance with section 4.10 of the Canada-Saskatchewan Immigration Agreement. The applicant submits that such notice would have served to provide clarification on the issue of the existence of a reimbursement mechanism for special education costs to the Ministry of Education prior to the refusal.

[28] The respondent argues that the lack of notice does not constitute a breach of the procedural fairness due to the applicant because the Canada-Saskatchewan Immigration Agreement is an inter-provincial agreement to which the applicant is not a party and of which he cannot claim the benefit.

[29] Section 4.10 of the Canada-Saskatchewan Immigration Agreement stipulates that:

> 4.10 When a refusal of a nominee is likely, Canada will notify and advise Saskatchewan of the reasons for possible refusal prior to the refusal notice being issued to the provincial nominee. Saskatchewan may raise concerns with, or seek clarification from, the assessing officer at the relevant mission or the appropriate manager, when a Provincial Nominee is likely to be refused. Where the refusal is for reasons other than health, security or criminality concerns, Saskatchewan will have 90 days to raise concerns and seek clarification before notification is given to the provincial nominee by the immigration officer.
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> [Emphasis added]

[30] In my opinion, the above provision does not legally create a right of prior consultation of the province to the benefit of the applicant that can be invoked to quash the immigration officer's decision for lack of procedural fairness. I agree with the respondent that this case should be distinguished from *Kikeshian v Canada (Minister of Citizenship and Immigration)*, 2011 FC 658 at para 15, [2011] FCJ 832 [*Kikeshian*], cited by the applicant, which concerned a provincial nominee under the Entrepreneur Category who had not established to the satisfaction of the visa officer that he could become economically established in Canada.

[31] In *Kikeshian*, above, the Court found that the consultation duty did not arise out of an inter-governmental agreement but was expressly imposed by subsection 87(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, in the context of a scheme which recognizes a provincial nomination as *prima facie* evidence of an applicant's ability to become economically established in Canada. According to the Court's reasoning, this created a reasonable expectation on the part of the applicant that a visa officer would not refuse his application without notifying the provincial authorities that initially nominated the applicant. This is not the case here.

[32] Accordingly, I find that this third ground of attack is legally unfounded. Be that as it may, this negative finding has no effect on the two determination already made by the Court. Since the immigration officer has failed to conduct an individualized assessment and has acted unreasonably in requiring that there be evidence of a reimbursement mechanism, the Court must intervene.

CONCLUSION

[33] For the reasons above, the application for judicial review is allowed. The decision made on April 2011 by the immigration officer is set aside and the applicant's application for permanent residence is to be reconsidered by a different immigration officer after having allowed the applicant to submit any additional evidence relevant to the determination of the issues before the immigration officer.

[34] The applicant has proposed the two following questions for certification:

1. In assessing excessive demand under paragraph 38(1)(c) of the *IRPA*, is it a reviewable error for a Medical Officer or Immigration Officer to rely only on evidence of a government funding allocation to determine the cost that an excessive demand that an applicant might reasonably be expected to pose to social services, or is it necessary for the Medical Officer or Immigration Officer to individually assess the expected cost posed by the applicant?

2. In assessing an applicant's willingness or ability to pay to defray the cost of excess demand for social services in the context of assessing excessive demand under paragraph 38(1)(c) of the *IRPA*, is it a reviewable error for a Medical Officer to conclude that an applicant is "unable to pay" solely due to the fact that there is no mechanism in place to allow reimbursement of costs, where there is no legislative prohibition preventing voluntary reimbursement of such costs?

[35] The respondent opposes certification of the two questions proposed by the applicant on the basis that they would not be dispositive of an appeal or/and they do not raise a question of general importance, arguing notably that they are answered in the jurisprudence or they are too much fact driven, while ignoring the fact that the burden in on an applicant to show that he or she meets the requirement of the legislation.

[36] In view of the result of the case and considering the position taken by the respondent, no question shall be certified by the Court.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed. The decision made on April 20, 2011 by the immigration officer is set aside and the applicant's application for permanent residence is to be reconsidered by a different immigration officer after having allowed the applicant to submit any additional evidence relevant to the determination of the issues before the immigration officer. No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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