Federal Court Cour fédérale

Date: 20141218

Docket: IMM-4841-13

Citation: 2014 FC 1238

Ottawa, Ontario, December 18, 2014

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

ASMEETA BURRA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] On March 26, 2013, an immigration officer (Officer) at the High Commission of Canada in Pretoria, South Africa denied the application for permanent residency in Canada of the Applicant, Asmeeta Burra, as a result of her dependent son having been found to be medically inadmissible pursuant to ss. 11(1), 38(1)(c) and 42(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) and the *Immigration and Refugee Protection Regulations*, SOR/2002-227. This is the judicial review of that decision.

Background Facts

[2] The Applicant, a doctor, and her husband, an architect, are citizens of South Africa. The Applicant applied to immigrate to Canada under the Federal Skilled Worker category together with her husband and three sons. By letter dated August 20, 2012, referred to as a fairness letter, the Applicant was advised by the Officer that she may be inadmissible on health grounds because her youngest son, Diyav, had been diagnosed as having Autistic Spectrum Disorder (ASD), a condition determined likely to cause excessive demand on health and social services in Canada.

[3] As the Applicant had indicated in her application that her family intended to settle in British Columbia, the fairness letter stated that it was likely that her son's requirements for special education would fall into Level 2 of Unique Student Needs within the Funding Allocation System provided by the Ministry of Education in British Columbia, which would cost approximately $16,000 per year (based on 2005/2006 figures). Thus, the cost would be at least $80,000 over five years and up to $160,000 over ten years.

[4] The fairness letter also provided the Applicant with the opportunity to make further submissions. As cited in the letter:

> Before I make a final decision, you have the opportunity to submit additional information that addresses any or all of the following:
>
> - the medical condition(s) identified;
> - social services required in Canada for the period indicated above; and

> - your individualized plan to ensure that no excessive demand will be imposed on Canadian social services for the entire period indicated above and your signed Declaration and Ability and Intent.
>
> […]
>
> In order to demonstrate that your family member will not place excessive demand on social services if permitted to immigrate to Canada, you must establish to the satisfaction of the assessing officer that you have a reasonable and workable plan, along with the financial means and intent to implement this plan, in order to offset the excessive demand that you would otherwise impose on social services, after immigrating to Canada.

[5] In her October 18, 2012 response to the fairness letter, the Applicant indicated that her son's facilitation program is currently managed in South Africa at her family's expense by the Centre for Autism and Related Disorders (CARD). This is an outreach program by which he is visited every three months, there are also weekly Skype communications with his local facilitators and program managers, and, CARD's most recent correspondence confirmed that Diyav was the fastest progressing child in his age group. The Applicant states that her son needs were already significantly less than those of children with special needs and that, therefore, he would not require additional care. She indicated that he had always attended mainstream schools, and if CARD's facilitation of his progress became necessary in Canada, then the Applicant would continue to absorb that cost. The Applicant disputed that her son would require assistance over a ten year period as, at his current rate of progress, there was a strong possibility that he would not require any specialized facilitation or therapy for a ten year period.

[6] The Applicant also stated that her husband had visited Vancouver schools and therapy centres that manage children like her son and was pleased to learn that the aim of the British

Columbia system is to mainstream children with similar health profiles as quickly as possible. She sated that: "We intend pursuing at our cost the BC system of managing infantile development delays and in doing so will greatly reduce Diyav's dependency on specialized facilitation and therapy." Should his progress not meet anticipated milestones, then she and her husband foresaw no difficulty in subsidising Diyav's requirements from their current and anticipated resources. She estimated this cost at $18,300 per annum, which would be about 12% of their anticipated annual gross income based on data she obtained online which estimated annual salaries in Canada for architects and general practitioners. She further stated that they anticipated arriving in Canada with a minimum of $32,000, as demonstrated at the outset of their application, which would support them for at least two years and cover any additional costs related to their son's health needs.

[7] On March 26, 2013, the Officer informed the Applicant that her application for permanent residency had been refused. The Officer noted that the Applicant's response to the fairness letter had been reviewed but did not change the assessment of her son's health condition. In her reasons contained in the Computer Assisted Immigration Processing System Notes (CAIPS Notes), the Officer stated that she had reviewed the medical assessment received from the Medical Officer as well as the documents submitted by the Applicant in response. However, while the Applicant had submitted that she and her husband would be responsible for all costs required for special education needs, they had not:

> …submitted updated proof of funds nor proof of capacity to be able to provide these funds. Also, even if they had the funds, in BC, their province of destination, the funding for son's special education would be provided by the Ministry of Education up to the age of 19. I therefore agree with the Medical Officer's

> assessment that son's medical condition will likely create an excessive demand on Canadian social services…

Issues

[8] The issues in this application are as follows:

1. Did the fairness letter accord with the principles of procedural fairness?
2. Did the Officer undertake an individualized assessment?
3. Was the Officer's decision reasonable?

Standard of review

[9] Matters of procedural fairness and natural justice, such as whether the Applicant has had a fair opportunity to know and meet the case before her, are reviewed on a standard of correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79). The Supreme Court of Canada stated in *Hilewitz v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57 at para 56 [*Hilewitz*] that medical assessments are required to be undertaken in an individualized manner, and this Court has held that whether a medical assessment undertaken was sufficiently individualized is also to be reviewed on a standard of correctness (*Sapru v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 35 at paras 25-26 [*Sapru*]; *Banik v Canada (Minister of Citizenship and Immigration)*, 2013 FC 777 at para 20 [*Banik*]). For matters reviewed on a standard of correctness, it is for the Court to undertake its own analysis and provide the legal answers, and no deference is due to the decision-maker (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 50 [*Dunsmuir*]). Accordingly, the first two issues are to be determined on the standard of correctness.

[10] The standard applicable to an officer's findings on questions of mixed fact and law, including assessments of medical inadmissibility, is reasonableness (*Banik*, above, at para 18). When reviewing the substantive decision of an administrative decision-maker, in this case the Officer, the Court is concerned with "the existence of justification, transparency and intelligibility within the decision-making process" and whether "the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir,* above, at para 47).

Issue 1: Did the fairness letter accord with the principles of procedural fairness?

Applicant's Submissions

[11] The Applicant submits that the decision of the Officer was procedurally unfair. She submits that a reasonable person, not represented by counsel, would not understand from the standard form fairness letter that they cannot merely provide evidence that they will cover the cost of the services outlined in the letter. While she was told that her son's education would cost $16,000 per year and that this amount was excessive, she was not told that she was unable to subsidize the cost of public education. While the Officer was seeking information on the provision of private schooling in British Columbia, this was not apparent from the fairness letter. Rather, the letter concentrated on the cost of special education, and it is this aspect of the Officer's concerns that her submissions addressed. The Applicant was unaware that the Government of British Columbia could not be reimbursed directly for the cost of the educational services and would have provided more concrete information on arrangements to be made with

private schools if she had known such a plan was indeed required. As a result, the Applicant was denied a meaningful opportunity to respond to the Officer's concerns.

Respondent's Submissions

[12] The Respondent acknowledges the requirement of *Sapru*, above, at para 31 that a fairness letter must clearly set out and provide a true opportunity to meaningfully respond to the concerns of the Medical Officer, but submits that this threshold was met in the circumstances of this case. The fairness letter mirrored the letter considered in *Sapru*, which was found to be sufficient, as they both advised the applicants of (i) the officer's concerns regarding medical inadmissibility due to the reasonable likelihood of excessive demand on social services, (ii) the particulars of the health condition and the social services the condition would require, and (iii) an invitation to submit additional information regarding the health condition and an individualized plan to ensure no excessive demand would be imposed on Canadian social services.

[13] The Respondent submits that there is no duty on an officer to advise a potentially inadmissible applicant on how to improve their application after they have been provided with a fairness letter (*Banik*, above, at paras 70 and 75).

Analysis

[14] The required content of a medical inadmissibility fairness letter was set out by Justice Dawson of the Federal Court of Appeal in *Sapru*, above. While agreeing with the reviewing

Judge that an officer is under no obligation to elicit information from an applicant, Justice Dawson went on to state:

> [31] In my view the Judge was correct, for the reasons that he gave. I would add one cautionary note. The Judge's conclusion was premised on the basis that the Fairness Letter gives an applicant "a fair opportunity" to respond to any concerns. This requires the Fairness Letter to set out clearly all of the relevant concerns so that an applicant knows the case to be met and has a true opportunity to meaningfully respond to all of the concerns of the medical officer.

[15] The factual aspects of this case, and the Applicant's submission that she was not afforded procedural fairness, are very similar to those in *Banik*, above. As in this case, there the applicant's minor child was diagnosed with ASD. A fairness letter was issued which invited the applicant to submit additional information, including information on the applicant's use of social services in Canada for the next five years, and an individualized plan to ensure that no excessive demands would be imposed on Canadian social services. The letter stated that the applicant must have a reasonable and workable plan, along with the financial means and intent to implement it.

[16] When his application for permanent residency was rejected, the applicant argued that it was incumbent on the officer to have alerted him to the deficiencies of his plan, as he was unaware that the family could not pay for education in the Ottawa-Carleton School Board and consequently did not research or make submissions on the viability of private schools in the area.

[17] Justice Russell found that the onus lay with the applicant to demonstrate there was a viable, individualized plan to ensure that no excessive demand would be imposed on Canadian

social services, and the procedural fairness letter which asked the applicant to address "the social services required in Canada" was sufficient to provide the applicant a meaningful opportunity to respond:

> [72] The procedural fairness letter clearly asks the Applicant to address the "social services required in Canada for the period indicated above," and that the Applicant provide an "individualized plan to ensure that no excessive demand will be imposed on Canadian social services for the entire period indicated above, and your signed Declaration of Ability and Intent."
>
> [73] Hence, I do not think the Fairness Letter misled the Applicant in any way as to what was required. His failure to research private school options and their costs was, he now acknowledges, his mistake because he did not realize that the family could not pay for public education in the Ottawa-Carleton School District. I accept that the Applicant did his best to address the issues raised in the procedural fairness letter, but he was represented by an immigration consultant and any mistakes which he or his counsel made cannot now be disregarded.

[18] I see little to distinguish *Banik*, above from the matter before me. The Applicant, however, points out that the applicant in *Banik* was represented by counsel. While in this case the Applicant did use counsel in preparing the application, she submits that she did not do so in preparing the response to the procedural fairness letter. The decision not to do so was her own and it cannot form the basis of an argument that it led to procedural unfairness (*Balasingam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1368 at paras 50-51).

[19] The Applicant also relies on *Sinnathamby v Canada (Minister Citizenship and Immigration)*, 2011 FC 1421 at paras 33-36, for the proposition that procedural fairness requires that follow-up fairness letters are to be provided in circumstances in which it is apparent that the Applicant has not understood the nature of the information being sought. I note that

Sinnathamby predated *Banik*, which was factually very similar to the matter before me but did not follow such an approach. Further, that the reasons of Justice Mandamin do not indicate that this second letter was required, he merely notes that one was sent.

[20] In this case, the August 20, 2012 fairness letter advised the Applicant that "It is reasonable to assume that special education will likely be required throughout his schooling years. This special education is costly and publicly funded." It further sought submissions on "your individualized plan to ensure that no excessive demand will be imposed on Canadian social services for the entire period indicated above and your signed Declaration of Ability and Intent." The declaration signed by the Applicant acknowledges receipt of a letter which listed all the social services required in relation to her son's medical condition and stated that she understood that the application may be refused unless she could provide a credible plan ensuring that her dependent would not impose an excessive demand on Canadian social services. It stated that she was providing, with the declaration, the details of the plan she intended to use in Canada and:

> I hereby declare that I will assume responsibility for arranging the provision of the required social services in Canada and that I am including a detailed plan of how these social services will be provided, along with appropriate financial documents that represent a true picture of my financial situation over the entire duration of the required services.

[21] The fairness letter stated that special education is costly, publicly funded and required an individualized plan to ensure no excessive demand will be imposed. The letter made the Officer's concerns known to the Applicant and stated:

> In order to demonstrate that your family member will not place an excessive demand on social services if permitted in immigrate to

> Canada, you must establish to the satisfaction of the assessing officer that you have a reasonable and workable plan, along with the financial means and intent to implement this plan, in order to offset the excessive demand that you would otherwise impose on social services, after immigrating to Canada.

[22] In my view, the fairness letter clearly set out all of the relevant concerns. It indicated that social services are publicly funded, and the requirement for an individualized plan was stated as being in addition to proof of the financial means to implement it. While the letter did not state that the Applicant could not reimburse the government for such costs, had the Applicant made due diligence inquires for purposes of preparing the individualized plan for her son's education, this would have been known to her.

[23] While the fairness letter may not have been as clear as might have been preferred, in my view the Applicant was not denied procedural fairness, she knew the case to be met and had the opportunity to meaningfully respond. While it would undoubtedly be advisable for the Minister to amend the standard form of the fairness letter so as to make it quite clear to visa applicants that they cannot pay for or subsidize publicly funded services, the law does not hold the Minister to a standard of procedural perfection (*Khan v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 345 at para 22 [*Khan*]).

Issue 2: Did the Officer undertake an individualized assessment?

[24] As noted above, the Applicant also contends that the Officer erred in failing to undertake an individualized examination of her son's potential inadmissibility. In analyzing the equivalent of what would become s. 38(1)(c) of the IRPA, the Supreme Court of Canada in *Hilewitz*

concluded that medical assessments for permanent residency cannot be conducted based on the classification of an illness. Rather, what must be assessed is the potential need for services based on its particular manifestation. In this regard, the Medical Officer is required to take into account both medical and non-medical factors, such as the availability or cost of publicly funded services along with the willingness and ability of the family to pay for the services. This requires an individualized assessment (*Hilewitz*, above, at paras 55-56).

[25] There is no question that the Medical Officer's initial assessment, as contained in the Medical Notification, was individualized. The Medical Officer stated that Diyav has a diagnosis of ASD, which was confirmed based on all information gathered, background checks, psychological testing, reports, as well as direct observation during clinical assessment. A complete and very detailed history, starting from Diyav's first psychological assessment in December 2010 was recounted, including a detailed review of the medical and other reports provided, as well as a description of the educational and therapy services utilized by Diyav. The Medical Officer recognized that Diyav is currently functioning in the borderline range (upper limits) of intellectual potential and seems to have benefited from, and will continue to benefit from, specialist intervention. Further, that it was recommended, amongst other things, that there be continued occupational therapy, continued speech and language therapy, a small class learning environment and a dedicated facilitator at school. Having taken all of this into account, the Medical Officer estimated the cost of special education for Diyav to be at least $80,000 to $160,000 for the next five to ten years. In my view, this was not a cursory examination based on the symptoms of ASD generally, and an individualized assessment was conducted.

Issue 3: Was the Officer's decision reasonable?

Applicant's Position

[26] The Applicant also submits that the decision was unreasonable for two reasons. Firstly, the Medical Officer's reasons stated that the new material provided by the Applicant in response to the fairness letter did not modify the assessment of medical inadmissibility because "...no proof has been submitted showing a specific educational plan for Diyav. No proof of available funds or proof of capacity to be able to provide these funds." However, the Applicant had included with her application a letter confirming a bank balance in excess of R250,000 (approx $32,000 per the Applicant's response). Furthermore, in her letter in response to the fairness letter, she set out her and her husband's projected earnings. Therefore, the Applicant argues that the Medical Officer's finding was not based on the record and was unreasonable. As the Officer relied on the Medical Officer's findings, the Officer's decision is also unreasonable.

[27] Secondly, the Applicant submits that the decision was unreasonable because the Officer and the Medical Officer did not consider that her son is currently in programming, that he is the fastest progressing child in his group and, therefore, would be unlikely to require special facilitation over ten years; and, that his parents already engage the services of private care providers. In short, he did not receive individualized assessment and, although the Applicant contested the Medical Officer's finding as to the level and type of social services required, this is not reflected in the reasons.

Respondent's Position

[28] The Respondent submits that the Applicant did not contest the diagnosis or the estimated costs of the required social services. Further, the Officer was properly concerned about the Applicant's willingness and ability to pay as the Applicant merely speculated as to her and her husband's expected income. The Applicant also failed to meet her onus of making out her case and setting out a workable plan. A plan must be comprehensive, and this Court has found that merely offering to reimburse the province to be insufficient to overcome a medical inadmissibility finding. In this case no information as to private education that the Applicant's son might require was provided (*Chauhdry v Canada (Minister of Citizenship and Immigration),* 2011 FC 22 at para 49 [*Chauhdry*]; *Sharma v Canada (Minister of Citizenship and Immigration),* 2010 FC 398 at paras 15-18; *Banik*, above, at paras 67-68 and 74).

Analysis

[29] It is true that the Medical Officer stated that there was no proof of available funds when in fact there was one document included in the original application indicating a bank balance held by the Applicant's husband. Whether that document was before the Medical Officer at the time of the original assessment is unknown. Although the Applicant made reference to the sum of $32,000 in her response she did not provide any further financial information. The CAIPS Notes of the Officer state that the Applicant had "not submitted updated proof of funds nor proof of capacity to be able to provide these funds." Thus, it is apparent that regardless of the finding by the Medical Officer, the Officer was aware of the original financial information provided by the Applicant.

[30] As stated in *Sapru*, the medical officer must provide the immigration officer with a medical opinion about any health condition of an applicant and the likely cost of treating the condition. When an applicant submits a plan for managing the condition, the medical officer must advise the immigration officer about such things as the feasibility and availability of the plan. The immigration officer must "rely upon the opinion of the medical officer about medical matters, including the medical condition of an applicant, the likely cost of treating the medical condition and whether the applicant's health might reasonably be expected to cause excessive demand on social services." Before reliance can be placed on the opinion of a medical officer, an immigration officer is required to ensure that the opinion provided by the medical officer is reasonable (*Sapru*, above, at paras 36-37, 43).

[31] The Medical Officer had determined that even a conservative estimate of the cost of the special education at issue to the province amounted to a minimum of $80,000 to $160,000 for five to ten years of schooling and the only information as to existing funds concerned the amount of $32,000. Thus even if this information was overlooked by the Medical Officer, in the absence of any further or updated information in the Applicant's response, such as an actual bank statement as proof of funds sufficient to pay $80,000 to $160,000, the Medical Officer's opinion was not unreasonable. In any event, this was not a medical matter and the Officer did not rely on the finding as he acknowledged that there had been no updated financial information as to proof of the ability to meet this cost.

[32] As to the capacity to be able to provide the funds, the Applicant did not provide any information suggesting that she and her husband had offers of employment that would support

their capacity to sustain the cost. While she submitted an online estimate of what architects and general practitioners earn in Canada, this was not proof of capacity to provide the funds.

[33] I would also note that prior jurisprudence has held that 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 (*Chauhdry*, above, at para 53). The same would be true of specialized educational needs.

[34] The Medical Officer also gave as a reason that no educational plan had been provided. This is correct. In her response to the fairness letter, the Applicant took the position that her son was the fastest progressing child in his age group at CARD and that he would not require special or additional care. She also stated that at his rate of progress he would not need any specialized facilitation or therapy over a ten year period. This position is entirely at odds with the detailed medial assessment conducted by the Medical Officer and the reports and information upon which it was based. The Applicant did not provide an educational plan, in part, because she was of the view that specialized education and care would not be required. While she was entitled to that view, in the absence of medical evidence to sustain it, her decision not to provide the required individualized plan meant that she did not meet her onus of establishing that Diyav's needs would not be likely to cause excessive demand on Canadian social services.

[35] The Applicant also stated that her intent was to pursue, at her cost, the provincial system of managing infantile development delays "and in doing so will greatly reduce Diyav's dependency on specialized facilitation and therapy." This was followed by the statement that if

her son's progress did not meet anticipated milestones, then she foresaw no problem in subsidizing his therapy requirements.

[36] In my view, the Applicant simply did not provide an individualized plan. What little she did put forward was a statement of intent which was contingent and not specific. It was inchoate. The Applicant should have sought advice and provided a clear plan that would address the problem of excessive demand (*Chauhdry*, above, at paras 49-50). The burden of establishing eligibility for a visa is on the applicant (*Khan*, above ,at para 22). She did not, and in light of the record, I find both the Medical Officer and the Officer's decisions to be reasonable.

[37] While the Applicant submits that the Medical Officer failed to refer to her submissions concerning the level of services her son may require in his reasons, in my view this was not necessary. The Medical Officer listed the information she had reviewed, which included the Applicant's response and the entire medical file. And, as noted above, the Applicant did not support her view with new medical evidence. Accordingly, there was little to respond to.

[38] Reasons may not include all of the arguments or other details that a reviewing Court may prefer, but this does not necessarily impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however, subordinate, leading to its final conclusion. If the reasons allow the reviewing Court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* test will be met (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*,

2011 SCC 62 at paras 14-16). When viewed as a whole in light of the record, the Officer's decision is reasonable (*Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 at para 3).

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and

2. No question for certification was proposed and none arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4841-13
STYLE OF CAUSE:	ASMEETA BURRA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 24, 2014
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	DECEMBER 18, 2014

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