Federal Court  Cour fédérale

**Date: 20150408**

**Docket: IMM-6349-14**

**Citation: 2015 FC 428**

**Vancouver, British Columbia, April 8, 2015**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**SARABJIT KAUR SAROYA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] Ms Saroya challenges a decision of the Immigration Appeal Division [IAD] which rejected her appeal of a Visa Officer's decision based on humanitarian and compassionate [H&C] grounds. For the reasons that follow, this application for judicial review is dismissed.

## I. Background

[2] Ms Saroya is a citizen of India and permanent resident of Canada. She immigrated to Canada under the sponsorship of her first spouse in 2005. They had two daughters. Tragically, these children died in a fire in 2010. Ms Saroya's marriage then broke down. She separated from her ex-husband in 2011. She has suffered from depression since these horrible events.

[3] Ms Saroya entered into a common-law relationship when visiting her parents in India. On July 9, 2013, she gave birth to a son in Canada. She sponsored her common law spouse for permanent residence in Canada. At the hearing, counsel for Ms Saroya informed the Court that tragedy has struck again, as the common-law spouse has passed away.

[4] Ms Saroya applied to sponsor her parents for Canadian permanent residence. During their medical checks, both were diagnosed as HIV positive. By decision dated February 21, 2013, a Visa Officer refused the application on the ground that both sponsorees were inadmissible for medical reasons.

[5] Ms Saroya appealed to the IAD. She did not challenge the validity of the refusal for medical reasons. Rather, she requested relief on H&C grounds. The IAD held a hearing on July 8, 2014. The panel received testimony from Ms Saroya and her mother, who was linked in by telephone. Afterwards, counsel for the Minister gave her consent to allow the appeal. At the panel's request, counsel for the applicant and the Minister provided post-hearing submissions confirming a joint proposal that the appeal be allowed.

[6] Despite this joint proposal, the IAD dismissed the appeal by decision dated August 6, 2014, and communicated to the applicant the next day.

[7] The IAD found that the applicant did not establish her case on the balance of probabilities. It discussed various relevant H&C factors.

[8] The panel began with "improved medical condition". The evidence showed that the parents are asymptomatic and attend a clinic every month. The panel determined that this was a neutral factor.

[9] The panel moved on to "excessive demand on Canadian health services". It agreed with the opinion of the medical professional referenced in the Visa Officer's decision. The applicant did not provide contradictory evidence. This was a negative factor.

[10] The panel next considered the "availability of health services abroad and in Canada". The parents receive free anti-retroviral medications in India. They presented no evidence of hardship in accessing medical services there. Therefore, allowing the appeal "would result in a direct transfer of health care costs to be entirely borne by the Canadian taxpayer". This was a significant negative factor.

[11] Considering the "cost of treatment of the medical condition", the panel endorsed the medical officer's opinion that it will exceed the average Canadian per capita costs over five years. The applicant did not provide contradictory evidence. This was a negative factor.

[12] The IAD then looked at the "availability of family support in Canada". The parents only have their daughter and infant grandson in Canada. By contrast, they have eight siblings (and their respective spouses) and 17 or 18 nephews and nieces in India. The IAD concluded that there is far more support for the parents – and for the applicant – abroad as opposed to Canada. Moreover, the applicant's precarious financial situation cast doubt on her ability to support her parents in Canada. This was a negative factor.

[13] The panel moved on to "psychological dependencies". Counsel for the Minister submitted that, as the sole child, it was the applicant's cultural duty to care for her parents. The panel stated that this cultural duty was not discussed by the applicant in her testimony, evidence or written submissions. The panel also rejected the suggestion that the parents are financially reliant on the applicant for their day-to-day needs. However, the panel accepted that the applicant suffers from serious depression. The panel expressed sympathy for the applicant and attributed "slight positive weight" to this factor.

[14] The panel concluded with analysis of the best interests of the child [BIOC], stating that it was "alert, alive and sensitive" to this factor. It rejected the suggestion that placing the child in day care in Canada is a negative option. While it might be preferable and cheaper to have the grandparents available to baby-sit, thus affording "positive weight towards the best interest of [the] child", that weight was not sufficient to override the other negative factors.

[15] Upon receiving this decision, Ms Saroya applied for judicial review.

## II. Issue

[16] The sole issue before the Court is whether the IAD erred in finding that there were insufficient H&C grounds to allow the appeal.

## III. Standard of Review

[17] The decision under review involves the exercise of discretion and the application of specialized legislation to particular facts. The standard of review is reasonableness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 52-58.

## IV. Analysis

[18] The Court expresses its deepest sympathies to Ms Saroya, whose life has taken several tragic turns during the last decade.

[19] However, the Court can only intervene if the IAD committed a reviewable error. The record does not disclose any such error in this case. The decision rendered by the IAD falls within the range of outcomes defensible with respect to the facts and the law.

[20] As a matter of law, the IAD is entitled to reject a joint submission if it provides reasons for doing so: *Fong v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 1134 at para 31. The fact that counsel for the Minister favoured granting the appeal at the conclusion of the hearing had no binding force on the IAD.

[21] The IAD provided adequate reasons here. Although the applicant disputes its conclusions, the Court does not have the function of re-weighing the evidence on judicial review. Since the IAD did not assess the evidence unreasonably, the Court must defer to its exercise of discretion.

[22] The Court agrees with the Minister that the IAD did not misapprehend the parents' medical condition. It clearly stated that their condition had not worsened and reasonably ascribed neutral weight to this factor.

[23] Counsel for the applicant disputed the medical officer's opinion without offering any evidence in rebuttal. Again, the Court agrees with the Minister that there is no reviewable error. The case law is clear that a medical officer must render a personalized assessment of the circumstances of each individual when medical inadmissibility concerns are raised. If this requirement is met, then a Visa Officer may confirm the medical officer's opinion without further review of the record: see e.g. *Hilewitz v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57; *Canada (Citizenship and Immigration) v Colaco*, 2007 FCA 282; *Mazhari v Canada (Citizenship and Immigration)*, 2010 FC 467. It stands to reason that the IAD can properly confirm the Visa Officer's approval of the medical assessment, in the absence of contradictory evidence presented by either party.

[24] The medical officer made a finding that the parents would require "publicly funded and expensive" treatment and medication in Canada. This finding was reasonably upheld by the Visa Officer and the IAD. Indeed, the applicant appears to completely misunderstand the decision

under review when she suggests that the medication should be available for free in Canada because it is free in India. If the parents could obtain the medication for free in this country, the costs would in all probability be borne by the public health care system, which is funded by the Canadian taxpayer. There is no indication in the record before the Court that pharmaceutical companies provide the medication as a gift to those who need it, either in Canada or in India. That suggestion finds no support in the evidence and cannot be used to undermine the medical officer's opinion.

[25] The IAD reasonably evaluated the dependencies between the applicant and her parents. While it questioned the significance of the financial support provided by Ms Saroya to her parents, the IAD accepted that she has a certain psychological dependency due to her depressive state. That is why it attributed slight positive weight to the factor of dependencies. Since this analysis went in her favour, the applicant cannot complain.

[26] In fact, the applicant mischaracterizes the matter by suggesting that the IAD's decision will sever her family ties and thereby inflict unusual, underserved or disproportionate hardship upon her and her parents. The IAD decision will simply maintain the *status quo*. Ms Saroya and her infant son will retain the right to live in Canada. Her parents will remain in India, where they have lived their entire lives. The applicant may continue to visit her family in India, as she has done several times recently. An authority cited by the applicant, *Davis v Canada (Citizenship and Immigration)*, 2011 FC 97, is wholly distinguishable. In that case, the applicant lived in Canada with her father and the government intended to deport her. That would have disrupted an existing relationship of cohabitation.

[27] There remains the assessment of the BIOC. The law is settled that a decision-maker conducting an H&C analysis must properly identify and define this factor and then weigh it against the countervailing factors: see e.g. *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 12 [*Legault*]. It is equally settled that this factor is not determinative – despite its importance – since it will almost always be the case that a child will benefit from continued presence in Canada in the company of his or her parents or other family members: see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75; *Canada (Minister of Citizenship and Immigration) v Hawthorne*, 2002 FCA 475 at paras 2 and 6; *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 24.

[28] In this case, the Court is satisfied that the IAD was alert, alive and sensitive to the BIOC. It ascribed positive weight to this factor but reasonably concluded that it did not outweigh the other negative factors.

[29] As a whole, the IAD's consideration of the various H&C factors survives review on the standard of reasonableness. On judicial review, the Court cannot "re-examine the weight given to the different factors" by the decision-maker: *Legault*, above, at para 11.

[30] This application is dismissed without costs. The parties did not propose any questions for certification and none are certified.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application is dismissed without costs.

No questions are certified.

"Richard G. Mosley"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-6349-14 |
| **STYLE OF CAUSE:** | SARABJIT KAUR SAROYA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | VANCOUVER, BRITISH COLUMBIA |
| **DATE OF HEARING:** | APRIL 1, 2015 |
| **JUDGMENT AND REASONS:** | MOSLEY J. |
| **DATED:** | APRIL 8, 2015 |

**APPEARANCES:**

| | |
|---|---|
| Baldev S. Sandhu | FOR THE APPLICANT |
| Bobby Bharaj | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Sandhu Law Office<br>Surrey, British Columbia | FOR THE APPLICANT |
| William F. Pentney<br>Deputy Attorney General of Canada<br>Vancouver, British Columbia | FOR THE RESPONDENT |