Federal Court  Cour fédérale

Date: 20150728

Docket: IMM-7161-14

Citation: 2015 FC 921

Ottawa, Ontario, July 28, 2015

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

FOUZIA AKBAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act] of a decision by a visa officer [the Officer] refusing her application for permanent residence in Canada on the basis that her dependent daughter, Zainab Fatima, was medically inadmissible as a person with Down's Syndrome.

[1] For the reasons that follow, the application is dismissed.

II. Background

[2] The Applicant, a citizen of Pakistan, applied for permanent residence in the Federal Skilled Worker [FSW] category as a teacher. Her application included her husband and their dependent daughter and when her daughter Zainab was born on April 9, 2011, she was added to the application. The Applicant was found to be eligible, having achieved the minimum 67 points required for the FSW category.

[3] As part of the processing of the application and determining their admissibility to Canada, the family attended medical examinations. By letter dated March 26, 2014, the Applicant was informed that Zainab had been determined to be a person whose health condition might reasonably be expected to cause excessive demand on health or social services in Canada and was therefore inadmissible under paragraph 38(1)(o) of the IRPA. The Officer made the following assessment in the fairness letter:

> This 2-year old female child has Down's Syndrome with intellectual and speech impairment. Her medical condition will be present throughout her life.
>
> If admitted to Canada as a permanent resident, she will be eligible for and will likely require a combination of health services and social services.
>
> From a health services perspective, she would require a full assessment and ongoing support from a team of specialists to include pediatricians, neurologists, and physiotherapists to share in her rehabilitation/therapy care.

> From a social services perspective and in order to meet her educational needs until she is 19, she will likely be identified as an exceptional student requiring special education suitable for a child who is physically/mentally disabled/chronic health impaired. This special education teacher/assistant and will include the services of a speech/language therapist. Of note, she comes from a caring supportive family and while she lives at home, much of her attendant care is provided by her family. If she is admitted to Canada, her family will likely utilize intermittent community provided respite care. Should she leave home, she will likely require the services of a personal care attendant. The provision of the above mentioned health services and social services are expensive and publicly funded.

[4] The Applicant was provided with an opportunity to provide additional submissions prior to a decision being made, which she did by letter dated May 16, 2014. The Applicant indicated that she would be financially responsible for all of Zainab's health and social services, that she had experience teaching children with Down's Syndrome and would teach her own daughter and that Zainab does not currently have any serious health conditions and has an IQ very close to a 'normal' IQ for babies. The Applicant also indicated in her letter that she was trying to obtain private health insurance in Canada, that she and Zainab would return to Pakistan annually to take all necessary medical tests, and that her sister-in-law would help provide care for Zainab when the Applicant was unavailable. This letter was accompanied by letters attesting to Zainab's health from a speech therapist, a doctor, a vision clinic and a cardiac centre and a letter from the Govt. College for Women Sambrial attesting to the Applicant's employment as a lecturer in education, that she holds a Master's Degree in Education, and that her curriculum included the education of children with Down's Syndrome.

III. Impugned Decision

[5] A note in the Computer Assisted Immigration Processing System [CAIPS] dated August 12, 2014 indicates that a medical officer reviewed the Applicant's response and made the following assessment:

> …I am of the opinion that the new material does not modify the assessment of medical inadmissibility. The reason for this is that the child has Down's syndrome with intellectual and speech impairment. The applicant's health conditions will require services that are expensive and publicly funded, therefore, she remains inadmissible on health grounds. While the inadmissibility on health grounds remains, the visa officer may consider the non-medical documents provided under procedural fairness.

[6] The Officer reviewed the Applicant's response and the medical officer's assessment the same day. He or she acknowledged that Zainab "does not suffer from a cardiac condition and enjoys good health," but found that Zainab's diagnosis was not contested by the Applicant, that Down's Syndrome is a permanent condition, and that she is therefore an "exceptional child who will require a full assessment, as well as ongoing support throughout her childhood and realistically, her life." The Officer also acknowledged the Applicant's statements regarding Zainab's education, but noted that as an applicant in the FSW category, it is expected that she will become economically established in Canada, which would not be possible if she is homeschooling Zainab. The Officer was concerned that there was no evidence to support the family-based respite care and dismissed the Applicant's stated intentions to obtain private health insurance and to return to Pakistan to be assessed annually as being unrealistic and untenable given the availability of public healthcare in Canada. The Officer concluded that he or she was

not satisfied that the Applicant had demonstrated that "she would be in a position to mitigate the demands on social services that the admission of her daughter would generate".

[7] The Officer's decision was communicated to the Applicant by letter dated August 15, 2014. The decision stated that pursuant to subsection 42(a) of the Act, the Applicant herself is inadmissible to Canada because her accompanying family member, Zainab, had been found to be inadmissible on health grounds in accordance with subsection 38(1) of the Act.

IV. Legislative Framework

[8] Inadmissibility on health grounds due to excessive demand on health or social services, is governed by subsection 38(1) of the *IRPA*:

38. (1) A foreign national is inadmissible on health grounds if their health condition	38. (1) Emporte, sauf pour le résident permanent, interdiction de territoire pour motifs sanitaires l'état de santé de l'étranger constituant vraisemblablement un danger pour la santé ou la sécurité publiques ou risquant d'entraîner un fardeau excessif pour les services sociaux ou de santé.
(a) is likely to be a danger to public health;	
(b) is likely to be a danger to public safety; or	
(c) might reasonably be expected to cause excessive demand on health or social services.	
[Emphasis added.]	[Soulignement ajoutée.]

[9] "Excessive Demand" is defined in subsection 1(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 as follows:

1. (1)	**1.** (1)
…	…
"excessive demand" means	« fardeau excessif » Se dit:
(a) a demand on health services or social services for which the anticipated costs would likely exceed average Canadian per capita health services and social services costs over a period of five consecutive years immediately following the most recent medical examination required under paragraph 16(2)(b) of the Act, unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is no more than 10 consecutive years; or	a) de toute charge pour les services sociaux ou les services de santé dont le coût prévisible dépasse la moyenne, par habitant au Canada, des dépenses pour les services de santé et pour les services sociaux sur une période de cinq années consécutives suivant la plus récente visite médicale exigée en application du paragraphe 16(2) de la Loi ou, s'il y a lieu de croire que des dépenses importantes devront probablement être faites après cette période, sur une période d'au plus dix années consécutives;
(b) a demand on health services or social services that would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada as a result of an inability to provide timely services to Canadian citizens or permanent residents.	b) de toute charge pour les services sociaux ou les services de santé qui viendrait allonger les listes d'attente actuelles et qui augmenterait le taux de mortalité et de morbidité au Canada vu l'impossibilité d'offrir en temps voulu ces services aux citoyens canadiens ou aux résidents permanents
[Emphasis added.]	[Soulignement ajoutée.]

V. Issues

[10] The following issues are raised in this application:

1. Did the Officer fail to reasonably assess the Applicant's plan to mitigate the excessive demand on Canada's health and social services?

2. Did the Officer err by failing to issue reasonably adequate reasons?

3. Did the Officer breach the duty of procedural fairness by failing to convoke an interview?

VI. Standard of Review

[11] The assessment of evidence – including factually intensive determinations of the feasibility of medical mitigation plans or the precision of a medical diagnosis –is a factual matter that is within the specific expertise of the decision maker and raises questions of mixed fact and law. Such factual issues attract the deferential standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

[12] As a general rule, issues related to natural justice and procedural fairness – including whether an Applicant has had a fair opportunity to know and meet the case, and the determination of an officer's obligations under the IRPA – are reviewable under the standard of correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339).

VII. Analysis

A. *Did the Officer fail to reasonably assess the Applicant's plan to mitigate the excessive demand on Canada's health and social services?*

[13] The intent of the current medical inadmissibility provisions is to avoid negative impacts on Canada's publicly funded health and social services systems by refusing admission to prospective immigrants whose health conditions would create excessive demands on health and social services in Canada. These objectives are to be attained while still recognizing that certain immigrant groups with compelling humanitarian and compassionate reasons for entering Canada should not be barred for health reasons.

[14] In accordance with the leading decisions in this area of *Hilewitz v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 SCR 706 [*Hilewitz*] and *Sapru v Canada (Citizenship and Immigration)*, 2011 FCA 35, [2012] 4 FCR 3 [*Sapru*], medical and visa officers must both conduct an individualized assessment. *Sapru* explains that the medical officer should assess the likely demands an applicant may make on services, the scarcity or cost of the services, and the willingness and ability of the family to pay for the services. In particular, *Sapru* provides the following guidance, stating that medical officers must: (i)"take into account both medical and non-medical factors," (ii) "provide the immigration officer with a medical opinion about any health condition an applicant has and the likely cost of treating the condition," and (iii) "[w]hen an applicant submits a plan for managing the condition, the medical officer must consider and advise the immigration officer about things such as the feasibility and availability of the plan" (*Sapru* at para 36).

[15] *Sapru* and *De Hoedt Daniel v Canada (Citizenship and Immigration)*, 2012 FC 1391, 422 FTR 69 [*De Hoedt Daniel*] clarify that the visa officer may rely on the opinion of the medical officer on medical matters. However, the visa officer must assess the reasonableness of the medical officer's opinion regarding the expected excessive demand on health and social services, and conduct a separate but similar determination on the feasibility of an applicant's plan to mitigate the cost of such services.

[16] The Respondent provided a table which summarizes the conclusions of the projected costs incurred over the first five years of the Applicant gaining permanent residency as follows:

Social Service	Extra Annual Cost	Years Required	Total 5 Yr Cost
Special Education Extra Cost	$17,909 to $23,142	5	$89,545 to $115,710
Full-Time Education Assistant	$35,000	5	$175,000
Speech Therapy, Occupation Therapy, Social Worker (ongoing)	Variable	5	Variable
Psychological Assessment	$2,500 to $3,000	1	$2,500 to $3,000
Total Extra Cost	$55,409 to $61,142		$267,045 to $293,710

[17] Even if there was substance to the Applicant's argument that a visa officer will err by failing to consider the particular circumstances of an applicant prior to making a finding of medical inadmissibility, including the applicant's ability to pay for his or her own medical or social services, and accepting for the sake of argument that little in the way of costs would be incurred during the first two years of permanent residency, the fact remains that for at least 3 of the 5 consecutive years immediately following the assessment, Zainab would still cost the Ontario public school

system an extra $17,909 to $23,142 per year, and an additional $35,000 per year for a full-time education assistant.

[18] The Applicant claims that her plan is workable as she would obtain private medical insurance for Zainab and personally home-school her. I agree with the Respondent that the Applicant submitted no documentation from insurers willing to underwrite Zainab's health care. Financial asset information and familial letters of support were also missing from the mitigation plan. The Applicant's establishment in Canada is based on her obtaining employment as a member of the Federal Skilled Worker class, which makes speculative her proposed employment so that she can personally home-school her daughter. I agree with the Respondent's contention that the Officer could reasonably conclude that the Applicant's mitigation plan was not feasible and sustainable and with comments that the Applicant provided "no evidence to support" the proposal.

B. *Did the Officer err by failing to issue reasonably adequate reasons?*

[19] It follows from the foregoing, that the Court is satisfied with the reasons provided by the Officer.

C. *Did the Officer breach the duty of procedural fairness by failing to convoke an interview?*

[20] I tend to agree in some respects with the Applicant's contention that the fairness letter is inadequate. I find that it could point out more clearly the requirement for a mitigation plan. It is also inadequate in failing to provide the average Canadian per capita health services and social

services costs over a period of five consecutive years, in order for the Applicant to have some idea of the degree of mitigation required so that she may provide supporting financial information in support of the mitigation plan. In a close case, this might have constituted a failure of procedural fairness. However, the margin of mitigation is of such a degree in the present case, that the issue does not arise.

VIII. Conclusion

[21] For the foregoing reasons, the application is dismissed. There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed and that there is no question for certification.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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