Federal Court  Cour fédérale

Date: 20161103

Docket: IMM-2014-16

Citation: 2016 FC 1229

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 3, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

DJAMEL EDDINE KASDI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS:

[1] This is an application for judicial review under section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision made by an immigration officer to deny the permanent resident visa that the applicants required to immigrate to Canada as skilled workers.

[2] At the beginning of the hearing I asked for clarification on exactly what was involved in the grievance against the decision. Counsel for the applicant candidly and transparently argued that the determination letter in this case was undermined by its lack of reasonableness in that it did not indicate why the applicant was refused.

[3] This determination letter, dated May 4, 2016, was not particularly forthcoming as to why the permanent resident visa was not issued. It stated that under section 38(1) of the Act, one of the persons who wanted to immigrate to Canada might reasonably be expected to cause "excessive demand" on social and health services. The letter provided the regulatory definition of excessive demand. Having indicated that additional documents had been sent by the applicants and received by the immigration officer, the letter stated that [TRANSLATION] "your mitigation plan [has been] carefully [reviewed] to assess your ability and intent to reduce the financial impact on Canadian health and social services, and I have found that your plan was not adequate to allow a change in the assessment of your health or that of the member of your family." The letter concluded laconically that a member of the principal applicant's family is inadmissible because the person might reasonably be expected to cause "excessive demand" on social or health services, and therefore under paragraph 40(2)(a) of the Act, as a member of the family, all are inadmissible. In the applicant's opinion, this is an unreasonable decision because the whys and wherefores are unknown.

[4] In this case, one of the applicant's children suffers from Down syndrome, which causes developmental delay. It seems that in this case, trisomy 21 syndrome is the source of cognitive developmental delay but does not appear to have generated any malformations.

[5] The Court sympathizes with the applicant in that the May 4, 2016 letter provides at best general indications, pursuant to which the administrative decision-maker found that subsection 38(1) of the Act applied. This subsection reads as follows:

Health grounds	**Motifs sanitaires**
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.	

In this case, it will be understood, it is not the likelihood of a danger to public health or safety that is at issue, but rather it is the reasonable expectation of causing excessive demand. The English version of subsection 38(1) clearly reflects the difference between the three situations.

[6] It is the reasonable expectation of causing excessive demand that is at the heart of the Act. The concept of "excessive demand," rendered in French as "fardeau excessif,'' is defined in the *Immigration and Refugee Protection Regulations*, SOR/2002-227. Section 1 states:

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. (*fardeau excessif*)	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. (*excessive demand*)

[7] At least the May 4 determination letter provided an attached copy of the definition of this term, along with copies of the definitions of "health services" and "social services." That said, the fact remains that the applicant still does not know why his application for a permanent resident visa was denied.

[8] It is true that two fairness letters ("lettres requises par l'équité") were sent to the applicant, each providing additional information. The applicant therefore knew that the immigration officer's concerns were related to the demand on health and social services in Canada that might be caused if the applicant immigrated to Canada with a member of his family suffering from Down syndrome. But what would cause excessive demand? The applicant provided a plan which, in his view, avoided excessive demand. The May 4 determination letter did not provide any information that could explain why the plan was not satisfactory.

[9] In my view, it would have been good public policy to provide the details or at least give clearer reasons why the visa application had to be denied. The litigant would benefit from knowing that his case had been carefully reviewed. However, this is not fatal.

[10] The notes in the Global Case Management System maintained by Citizenship and Immigration Canada provide extensive details on the case review conducted by the administrative decision-makers in this matter. These notes form part of the elements which our Court considers to provide the (necessary) details of the administrative decision. They are part of the (*Wang v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1298, 302 FTR 127 decision and the case law cited therein; and very recently *Rahman v. Canada (Citizenship and Immigration)*, 2016 FC 793).

[11] The notes indicated that the applicant's case was re-opened in January 2016 after the Crown conceded that a previous review was deficient. This reconsideration was conducted by different people. The notes indicated that the Down syndrome child was diagnosed and his

developmental quotient assessed. It is not necessary to go into the details other than to indicate that individual auxiliary services will be required both in terms of psychomotor development and enrolment into a specialized school system. The notes indicated that [TRANSLATION] "it can reasonably be expected that he will have to be treated by a multidisciplinary team of specialists consisting of pediatricians, child development specialists, psychologists, psychiatrists, speech therapists and psychomotor specialists, and he will also receive a special-needs education."

[12] The notes also included an assessment of the related costs, at more than $46,000 over a five-year period. According to the administrative decision-maker, the average per capita in Canada is over $6,000, which would meet the definition of "excessive demand." I would add that the notes break down the costs to the nearest dollar.

[13] In an attempt to demonstrate that no excessive cost will be incurred, the applicant has stated his intention and commitment to cover the costs associated with his child. Copies of employment offer letters for the spouses were provided (up to $115,000.00 per year). Moreover, a person would be prepared to vouch for the costs, and the applicant indicated that he had substantial assets in his country of origin.

[14] The notes made on May 4, 2016, which clearly support the refusal letter dated that same day, revealed that the immigration officer was not satisfied with the plan. It was noted that the review of the financial resources available to the applicant did not support the finding that he would have the means to handle the health or social costs over the next five years. The plan was to enroll the child in a program called Caribou, at an annual cost of $17,000 for five half-days of

care per week. However, this program only accepted children up to age six, which left several years unaccounted for since the child was already four. The plan did not include any details on the care to be provided past that age. Furthermore, the spouses only had employment offers, which were already a year old when the decision was rendered. They do not appear to have been updated since then. As for the guarantor identified by the applicant, it was not considered entirely credible that someone who claims to be a friend would agree to incur such costs over the next five years. It was found that specialized education and therapy services were expected to be well above the average per capita cost in Canada, which at that time was $32,000 for a five-year period.

[15] At the hearing, counsel for the applicant did not dispute that the standard of review in this case is reasonableness. As for the applicant, he supported his contention that reasonableness is indeed the standard of review that applies in this case, citing *El Dor v. Canada (Citizenship and Immigration)*, 2015 FC 1406, a decision rendered by my colleague, Justice Denis Gascon. In it, Gascon J. cites other decisions of our Court. Paragraph 16 of his decision reads as follows:

> [16] The standard of review for assessing a visa officer's factual findings is reasonableness (*Ma v. Canada (Citizenship and Immigration)*, 2013 FC 131 [*Ma*] at para. 23; *Firouz-Abadi v. Canada (Citizenship and Immigration)*, 2011 FC 835 at para. 10). The standard of review for assessing the reason for rejecting the visa application and denying entry into Canada on medical grounds is also reasonableness because these are questions of mixed fact and law (*Burra v. Canada (The Minister of Citizenship and Immigration)*, 2014 FC 1238 [*Burra*] at para. 10; *Banik v. Canada (Citizenship and Immigration)*, 2013 FC 777 [*Banik*] at para. 18).

[16] The applicant's argument was that the May 4, 2016 determination letter constituted an unreasonable decision given the absence of reason. As we have just seen, this absence is offset

by the elaborate reasons provided in the notes that are stored in the Global Case Management System. This constitutes a comprehensive response to the legal argument made by the applicant. He did not try to argue that the reasons provided in these notes are inadequate *per se*. In light of these reasons, the applicant would have needed to successfully argue that this did not fall within a range of possible acceptable outcomes which are defensible in respect of the facts and law. If it is true that the May 4 letter is deficient because it does not actually provide the rationale, this is no longer the case when the notes are added. Consequently, it has not been argued before the Court that transparency and intelligibility, as well as the rationale, were now deficient. The application for judicial review must therefore be dismissed.

[17] I would add that the Court inquired whether the applicant claimed that the assessment of his child's case was generic rather than individual. This issue arose from the applicant's memorandum of fact and law, which cited the Supreme Court of Canada's decision in *Hilewitz v. Canada (Minister of Citizenship and Immigration)*; *De Jong v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 SCR 706. A significant part of this decision dealt with the need to make individual assessments. The Court viewed the term "excessive demand" as an obligation. Paragraphs 43 and 44 of this decision read as follows:

> 43 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 or his or her family to pay for the services.
>
> 44 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 demands on public funds.

At the hearing, counsel for the applicant stated that he did not claim that the assessment performed in this case was not individualized. The assessment not only covered the trisomic condition, but also the resulting impairment in this case, which requires a degree of medical attention.

[18] On the sole issue raised before the Court, there is no basis to grant the application for judicial review. The parties agree that there are no serious questions of general importance. I concur.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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