Date: 20080521

Docket: IMM-5015-07

Citation: 2008 FC 639

Ottawa, Ontario, May 21, 2008

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

MONICA AGGARWAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant is an adult female citizen of Canada. She seeks to have her father, mother and adult sister, all of whom presently reside in India, secure a visa so that they may enter Canada and reside near her in Canada. The Applicant has three other sisters, two of whom reside in the United States and one of whom appears to be a student in the United States.

[2] The Applicant's mother was denied a visa on the basis that a medical examination conducted on behalf of the Canadian government revealed that she had problems with her knees which were predicted to degenerate requiring surgical knee replacement with postoperative rehabilitation and physiotherapy. Thus it was determined by an Officer of the Canadian High

Commission in India by a decision dated May 1, 2006 that the mother was inadmissible under section 38(1)(c) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). This decision was appealed to a panel of the Immigration Appeal Division of the Immigration and Refugee Board (IAD). The IAD considered not only the Officer's decision respecting the Applicant's mother's medical condition but opinions of other medical practitioners who examined her mother and came to different conclusions as to her prognosis. The IAD also considered humanitarian and compassionate arguments raised by the Applicant as to conditions faced by her parents and sister in India and the benefits to them should they relocate to Canada. In a lengthy written decision dated November 13, 2007 the IAD panel considered all of the Applicant's arguments and dismissed the appeal.

[3] In her submissions to this Court, the Applicant acting on her own behalf, took issue with a number of findings made by the Officer and IAD panel and requested, by way of relief from this Court that the Officer's and IAD Panel's decision be quashed and that a visa for permanent residence be granted or "special relief such as a Tourist Visa for a period of 10 years" be granted to her Applicant's mother.

[4] The Applicant appears to have a misunderstanding as to the nature of proceedings such as this. This proceeding is a judicial review of the decision in question by the IAD panel. The Court may determine, on a standard of correctness, whether the decision is sound in law and, on a standard of reasonableness whether the factual findings were reasonable and any discretion vested on the panel was reasonably exercised. Further, the Court may determine if the panel accorded procedural

fairness to the parties and acted in accordance with natural justice and the principles set out in the *Charter of Rights and Freedoms*. The Court cannot determine a matter not put to the panel for determination nor can it substitute its views of the facts once it determines that the panel made its determination reasonably and within its jurisdiction. The only remedy a Court may provide is to quash the decision and send it back for a new determination, usually by a different person, perhaps with some guidance where it believes that the panel made errors.

[5] Here the Applicant asks by way of alternate relief for a temporary visa for her mother. The evidence before me is that no such visa was ever requested, thus no determination was made in respect of such a matter. I cannot, therefore, make any ruling in that regard.

[6] The Applicant's mother has been assessed, for the purposes of the Canadian High Commission in India, by a medical examiner appointed by the Commission. So long as there is no compelling reason to question the validity and reasonableness of that opinion, the Visa Officer cannot disregard that medical opinion (*Fei v. Canada (MCI)*, [1998] 1 F.C. 274 at para. 41, *Gilani v. Canada (MCI)*, 2003 FCT 153 at para. 17). The standard to be applied by the Officer in considering the medical opinion is that set out in paragraph 38(1)(c) of the IRPA as to whether the person "*might reasonably be expected to cause excessive demand on health and social services*".

[7] I have looked at the Tribunal Record and have not found the actual medical opinion by the doctor examining the Applicant on behalf of the High Commission. I find a Medical Notification on file, page 103 of the Tribunal Record, which is a report of a Dr. Brian Dobie stating his opinion

based on his review of the medical examination and all reports. The “examination” and “all reports” are not of record. Dr. Dobie says:

> *This 64 year old applicant born on June 11, 1941, has osteoarthritis of both knee joints. The specialist reports that she is obese and walks with a lurching galt. On examination he found varus deformities in both knees and pain along the medial joint lines. Extreme flexion was painful bilaterally. X-rays of the knees show total collapse of the medical joint space in both knees. Loose bodies are seen as osteophytes on the articular margins. According to the orthopaedic surgeon at this state she needs total knee replacement on both knees.*
>
> *The natural course of this medical condition is such that it is reasonable to expect a progressive deterioration requiring specialist management and orthopaedic surgery with bilateral knee replacement, followed by post operative rehabilitation and physiotherapy in a hospital or residential setting. This surgery is expensive and there already exist lengthy waiting periods in Canada for these services.*
>
> *Based upon my review of the results of this medical examination and all the reports I have received with respect to the applicant's health condition, I conclude that this applicant has a health condition that might reasonably be expected to cause excessive demand on health services. Specifically, this health condition might reasonably be expected to required services, the costs of which would likely exceed the average Canadian per capita costs over 5 years, and would add to existing waiting lists and delay or deny the provision of those services to those in Canada who need and are entitled to them. The applicant is therefore inadmissible under Section 38(1)(c) of the Immigration and Refugee Protection Act.*
>
> *Also has: Hypertension (401)*

[8] The record at pages 259 and 260 has puzzling hand written notes suggesting that the doctor who did the actual examination of the Applicant’s mother called the mother on his mobile phone and asked her to contact him in the evening. No explanation was offered for this request. A suggestion that the doctor may have been seeking inducement to influence his opinion was made

but this is only speculative. The IAD panel makes no mention of this incident in its reasons. It should at least have considered the matter and possibly sought an explanation. We are left without any evidence as to the actual assessment and reports and only another doctors opinion of them after a review.

[9] On the other hand, the Applicant was invited to provide her own medical opinions which she did. Dr. Rai, Director of Orthopedics, Joint Replacement Surgeon, at page 261 of the Record provides an opinion that "patient doesn't need total knee replacement with this clinical presentation". Dr. Umesh, Head and Orthopedics at Panchula General Hospital, page 262 of the Record says "may never require total knee replacement". Dr. Cheema, Chief of Orthopedics, The Livingston Orthopedics Group, New Jersey at page 264 of the Record says that she "does not require total knee replacement in the future" Dr. Gandhi, Sports Medicine at page 263 of the record says "she does not require knee surgery" Dr. Kapur, Rheumatologist/Osteoporis, Assistant Professor, University of Ottawa at pages 323-324 of the Record says: "at this point she would not be a candidate for total knee replacement".

[10] The Applicant's mother who at the time was about 65 years of age needs to be considered against the standard as to whether she might reasonably be expected to cause demands on health and social services. The *Immigration and Refugee Protection Regulations*, SOR/2002-227 section 1(1) define "excessive demand" as factual:

> *(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 by these Regulations, 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
(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 the denial or delay in the provision of those services to Canadian citizens or permanent residents. (fardeau excessif)

[11] Respondent's Counsel pointed to page 427 of the Record which provides demographic data from the Canadian Department of Health as to hip and knee replacements:

Demographic trends

The report found the largest rate of increase in patients between the ages of 45 and 54. Hip replacements doubled in this age group over 10 years (from 1,313 in 1994-1995 to 2,664 in 2004-2005). Older Canadians (age 65 and over) continue to make up the majority of joint replacement patients – representing 65% of hip replacement and 68% of knee replacement patients in 2004-2005. However, the number of older Canadians as a proportion of the total number of patients undergoing joint replacement surgery has decreased from 71% (1994-1995) to 66% (2004-2005 over 10 years, as more Canadians are getting joint replacements at a younger age.

[12] Thus when considering a 65 year old woman it is against the general background in Canada that people of that age a large number of whom are more prone to need knee replacements. The fact that this woman has some osteoporosis which in one undisclosed and possibly suspect medical opinion would require surgery must be weighed against a number of opinions all disclosed on the record from specialists in this area that she does not or at least not at present need knee replacement. This does not appear to have been properly appreciated or considered by the IAD. Simply to say, as the IAD did in paragraph 10 of its Reasons that "opinions vary" does not give sufficient weight to the disclosed opinions of experts against the undisclosed opinion of a single medical doctor.

[13] Simply to say that a 65 year old person has osteoporosis which may progress as time goes by as the IAD said at paragraph 10 of its Reasons does not address the issue which is, having regard to the provisions of section 38 of IRPA and section 1(1) of the *Regulations* and the general conditions in Canada for persons of that age group:

> *"Will this Applicant's mother taking all the medical evidence fairly into consideration, cause excessive demands on the health and social services of Canada?"*

[14] I conclude that the IAD did not reasonably consider the evidence and issues. The matter must be returned for proper consideration.

[15] In addition, the Applicant also raised a number of humanitarian and compassionate grounds, particularly before the IAD panel. Those grounds were reviewed and considered by the panel. Those considerations by the panel and its determination are to be reviewed on a standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 54, 146-149 and 154). Considerable deference should be given to a panel such as this which has considerable expertise in determining matters such as this. I find no reviewable error in this respect although I do find reviewable error as to the first issue, thus this matter must be reconsidered as a whole.

[16] Accordingly the application is allowed. There will be no certification as the matters raised are factual and peculiar to the circumstances here. There will be no order as to costs.

JUDGMENT

For the Reasons given:

THIS COURT ORDERS that:

1. The application is allowed and the decision of the Immigration Appeal Division dated November 13, 2007 is set aside;
2. The matter is returned to be considered by persons not involved in the decision set aside;
3. There is no question for certification;
4. There is no order as to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5015-07
STYLE OF CAUSE:	**MONICA AGGARWAL v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	May 20, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	Hughes, J
DATED:	May 21, 2008

APPEARANCES:

Ms. Monica Aggarwal	SELF-REPRESENTED
Ms. Agnieszka Zargoska	FOR THE RESPONDENT MINISTER OF CITIZENSHIP AND IMMIGRATION

SOLICITORS OF RECORD:

Monica Aggarwal Defense Construction Canada 141 Laurier Ave. W. Suite 801 Ottawa, ON K1P 5J3 Fax: (613) 949-5897	FOR THE APPLICANT
Department of Justice Civil Litigation Section 234 Wellington Street East Tower, Room 1241 Ottawa, ON K1A 0H8 Fax: (613) 954-1920	FOR THE RESPONDENT THE MINISTER OF CITIZENSHIP AND IMMIGRATION