Date: 20080521

Docket: IMM-4245-07

Citation: 2008 FC 642

Toronto, Ontario, May 21, 2008

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

WARREN ALFREDO VIDAURRE CORTES
ANGELITA ROSELA SOLANO QUESADA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review made pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 of a decision of an Immigration Officer, (the Officer) dated September 28, 2007, wherein the Applicants' application for permanent residence on Humanitarian and Compassionate (H&C) grounds was refused.

I. Facts

[2] Citizens of Costa Rica the Applicants arrived in Canada in May 2002 and made refugee claims that were rejected. Subsequently, the Applicants applied for a Pre-Removal Risk Assessment

and permanent residence on H&C grounds. Since their arrival in Canada they have celebrated the birth of a daughter.

[3] While in Canada, the Applicant Warren Cortes (Mr. Cortes) suffered serious physical injury as a result of a work place accident. He also alleges to have been seriously psychologically traumatized by the incident. After the accident, he underwent therapy and retraining under the auspices of the Workplace Safety and Insurance Board (WSIB). Part of his therapy included psychological assessments. The results of these assessments are found in the October 2005 Riverfront Medical Services Report, and the January 2006 Health Recovery Clinic Report.

[4] Mr. Cortes also included a January 26, 2006 report by a psychologist, Dr. Pilowsky, and a March 12, 2007 letter from their family doctor which comments on his psychological state.

II. The Officer's Decision

[5] In her reasons to dismiss the Applicants' H&C application, under the topic "Health and medical treatment", the Officer makes the following comments regarding Mr. Cortes' psychological state:

> The male applicant's psychological assessment was done around 26 January 2006 by Dr. Pilowsky, a psychologist. Dr. Pilowsky's assessment is based on one visit of the male applicant to his office. There is no evidence to show previous psychological assessments or visits or follow up visits to a mental health professional. Dr. Pilowsky stated that the male applicant suffers from Posttraumatic Stress Disorder, that he is very emotionally fragile, and if he had to leave Canada this could trigger an emotional collapse. The psychologist went on to say that:" if permitted to remain in Canada, the applicant's prognosis for future recovery is more optimistic, as he

> is willing to retrain and begin working as soon as he has recovered from his injuries". I am unsure how one psychologist was able to make this prediction of the future for the male applicant based on a one time meeting. Dr. J.E. Pilowsky's assessment is awarded the respect of a specialized assessment is deserving of, however I note with interest the timing of the assessment, the one time interview of the male applicant, the referral to the doctor by the counsel representing the applicant with their immigration case. Therefore, I find all of these actions self serving and thereby I am awarding little weight to Dr. Pilowsky's clinical diagnosis. [Emphasis added]

[6] In her conclusion, the Officer declares that she has "considered all information regarding this application as a whole.

III. Standard of review

[7] Both parties have commented on the standard of review in light of *Dunsmuir v. New Brunswick*, [2008] SCC 9. The standard of review to be applied to the decision of an Immigration Officer on an H&C application is reasonableness (*Kuhathasan v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 587 at paragraphs 16 to 17; *Markis v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 564 at paragraph 20).

IV. Submissions

[8] The Applicants submit that the Officer erred for not considering the assessments made in the October 2005 report of the Riverfront Medical Services (RMS), and in the January 2006 report of the Health Recovery Clinic (HRC).

[9] The Respondent notes that these other assessments do not show that the Applicant is being treated beyond the date of the January 26, 2006 report, and seems to suggest that the other assessments reports are somehow not worthy of any consideration simply because they do not show ongoing treatment. The Respondent also indicates that the non-consideration of the other assessments is of no importance given that the Applicants did not present any further evidence of treatment even though a request was made for further documentation.

[10] Further, the Respondent submits that when the Immigration Officer wrote that there was a lack of evidence regarding previous or follow assessments, she actually meant that the Applicant had provided no evidence to suggest that he followed up on any of the previous recommendations and received no treatment following the report by Dr. Pilowsky.

V. Issues

1. Did the officer err by disregarding, or misconstruing the medical evidence?
2. Did the officer err by conducting a deficient analysis of the best interests of the Canadian child?
3. Did the officer err by relying on extrinsic evidence not disclosed to the applicants?

VI. Analysis

Did the officer err by disregarding, or misconstruing the medical evidence?

[11] First, it is unclear why the assessment of the HRC and the RMS reports would be made irrelevant because there is no evidence of the applicant following up on the treatment there. Nor are they rendered irrelevant because there have been no further psychological assessments.

[12] Second, it is well established that the Board need not cite in its reasons all of the documentary evidence before it, and that there is a presumption that all documentary evidence has been weighed and considered unless the contrary is shown (*Florea v. Canada (Minister of Citizenship and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.)).

[13] But in this case, the Officer indicates in her reasons that she did not consider the other assessments in that she noted no evidence (of) previous psychological assessments or visits or follow up visits to a mental health professional. The reading of the entire paragraph dealing with Mr. Cortes' psychological condition indicates clearly that the Officer did not mean to say that there was no evidence of any follow up to the Assessments Reports of the HRC and the RMS. She meant simply to say what she wrote, that is that she did not find evidence of any other assessments.

[14] Further, it is clear that the Officer's major issues with Dr. Pilowsky's report is on the timing of the assessment plus the fact that it was made on the basis of one visit and also the fact that Mr. Cortes' assessment had been requested by his legal counsel. It is for those reasons that the Immigration Officer gives the assessment little weight.

[15] In contrast, both the HRC and the RMS reports were ordered by the WSIB as a result of the Mr. Cortes' accident. Further, the HRC Report's appears to have involved more than one meeting with Mr. Cortes.

[16] The HRC's report specifically lists Mr. Cortes as having the following diagnosis:

1. Pain Disorder with Both Psychological Factors and a General medical Condition (partially resolved);
2. Posttraumatic Stress Disorder (unresolved but better managed and understood by client);
3. Depressive Episode (partially resolved);
4. Adjustment Disorder (partially resolved);
5. Phobia: fear of heights (unresolved).

[17] The RMS Report indicates that Mr. Cortes exhibits, on DSM Formulation, features of: Post-traumatic Stress Disorder, Pain Disorder, and rules out Pain Disorder with Psychological Features and Adjustment Disorder with Depressed Mood and Anxiety.

[18] In addition, the Officer completely ignores the statement made by Dr. Pilowsky in his report to the effect that the Applicant "is attending treatment at (his) office", when he states that there is no evidence to show … visits or follow up visits to a mental health professional.

[19] The Officer ignored other evidence regarding Mr. Cortes' psychological state. While it may be that the Officer would have given those assessments very little weight given how old they were, it still remains clear that she did not come to her conclusions on Mr. Cortes' psychological state with regard to the evidence. Instead, she simply found reason to give very little weight to the one and only report she did consider. And in doing so she was careful to incorrectly note that there was no evidence of other assessments. She even disregards without giving any reasons a statement made by Dr. Pilowsky in his report that the Applicant was attending treatment at his office. This statement appears to contradict the Officer's finding that the applicant did not make visits or follow up visits to a mental health professional.

[20] A tribunal has an obligation to consider documentary evidence which is directly relevant to the case and the greater the relevance of evidence, as it is the case here, the greater the need for the tribunal to explain its reason for not attributing weight to that evidence. (*Cepeda- Gutierrez v. Canada (M.C.I.)*, [1998] F.C.J. No.1425). It is clear that the Immigration Officer's decision has ignored without valid reasons relevant evidence concerning the Mr. Cortes' health condition and follow up visits to a mental health professional. Consequently, the Officer's main finding that followed is found by this Court to be unreasonable.

[21] In view of its conclusion on the first issue the Court does not see the necessity to address the two other issues. The application will therefore be allowed.

[22] The Applicants have also asked for costs in the present case on the basis that the Respondent has unnecessarily provoked and prolonged litigation and showed a lack of sensitivity. This request is opposed by the Respondent who claims that the Applicants have failed to establish that costs are warranted in this matter.

[23] Section 22 of the *Federal Courts Immigration and Refugee Protection Rules* SOR/93-22 (the *Rules*) states that:

22. No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders	**22.** Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, la demande d'autorisation, la demande de contrôle judiciaire ou l'appel introduit en application des présentes règles ne donnent pas lieu à des dépens.

[24] The Applicants point to the decision of this Court in *Ndererehe v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1144 for a description of the grounds that might establish special reasons and to submit that bad faith or misconduct need not be established in order for the Court to find special reasons to grant costs.

[25] While the Court has a broad discretion in relation to costs under Rule 400 of the *Federal Court Rules*, that discretion is restricted in relation to Immigration proceedings under Rule 22. In order to be entitled to costs in Immigration matters, a party must demonstrate "special reasons".

[26] There is a policy behind the "no cost" rule. Costs were not to be a deterrent factor for those engaged in Immigration litigation. The Rule applies to Applicants and Respondents equally and the fact that an Immigration Officer may have been wrong or may have missed evidence, as is the case here, is not enough to overturn the basic "no cost" regime of Immigration judicial reviews. (*Iftikhar v. Canada (M.C.I.*) 2006 FC 49 at paragraphs 13 and 17).

[27] No special reasons have been shown in this case by the Applicants to warrant departure from the general rule that costs are not payable in respect to judicial review applications involving Immigration judicial reviews. There is no evidence of dereliction of duty or bad faith here on behalf of the Respondent, and no proof either that he prolonged litigation unnecessarily or showed a lack of sensitivity when he decided to contest the Applicants' application as he had the right to do. Therefore, no costs will be granted.

[28] The Court agrees with the parties that there is no question of general interest to certify.

JUDGMENT

FOR THE FOREGOING REASONS THIS COURT allows the application and remits the matter for reconsideration by a different Immigration Officer.

"Maurice E. Lagacé"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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