Date: 20081204

Docket: IMM-1144-08

Citation: 2008 FC 1346

Ottawa, Ontario, December 4, 2008

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

PARATIMA VASHISHAT
TARSEM LAL JALPAT
INDER KUMAR JALPAT

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Paratima Vashishat, the principal applicant, became a permanent resident of Canada in September of 1996. In March of 2000, Ms. Vashishat filed an application to sponsor her father, Mr. Tarsem Lal Jalpat, and younger brother, Inder Kumar Jalpat ("Inder"), as members of the family class category. Mr. Jalpat and Inder are citizens of India. A visa officer found Inder inadmissible pursuant to paragraph 38(1)*(c)* of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA") on the ground that his state of mental development might reasonably be expected to cause

excessive demands on health or social services. Ms. Vashishat appealed this decision pursuant to subsection 63(1) of the IRPA to the Immigration Appeal Division ("IAD") of the Immigration and Refugee Board ("IRB").

[2] This application under subsection 72(1) of the IRPA is for judicial review of the IAD's decision dated February 1, 2008 which dismissed Ms. Vashishat's appeal. At the conclusion of the hearing in Vancouver on November 20, 2008, I advised the parties that I would grant the application and would provide my reasons in writing.

Factual Background:

[3] Ms. Vashishat and Inder's mother passed away in 1993, leaving Ms. Vashishat and her father to care for Inder. Ms. Vashishat also has another brother who currently lives in India with his uncle. In 1996, Ms. Vashishat came to Canada as a sponsored fiancé. She married and lived with the man who sponsored her for nine months. She is now married to another man with whom she has a two-year old daughter.

[4] In March of 2000, Ms. Vashishat applied to sponsor her father and youngest brother's application for permanent residence in Canada. As part of the application process, both Mr. Jalpat and Inder were required to undergo a medical examination. The applicants were advised by letter dated May 26, 2006 that there were concerns about the medical admissibility of Ms. Vashishat's brother. They were informed that a medical officer had diagnosed Inder with mild mental retardation and had opined that his health condition might reasonably be expected to cause

excessive demand on social services. They were given until July 25, 2006 to provide additional information relating to Inder's medical condition and the issue of excessive demand.

[5] The applicants filed additional medical certificates relating to Inder's condition and capacities as well as a video showing Inder performing various activities independently. The medical officer reviewed the new evidence but maintained his original assessment.

[6] By letter dated November 28, 2006 their applications were refused by visa officer Michel Blouin who upheld the medical officer's recommendation and found Inder inadmissible because his medical condition might reasonably be expected to cause excessive demands on health or social services. Ms. Vashishat appealed this decision pursuant to subsection 63(1) of the IPRA.

[7] A hearing was held on December 10, 2007 at which Ms. Vashishat was the only witness called. She did not dispute her brother's medical diagnosis, but challenged the legal validity of the refusal. She argued that Inder is more capable than described in the refusal letter and, with family support, would not require the social services recommended. She filed an additional medical certificate from Inder's family doctor to substantiate her position. In the alternative, she submitted that there are sufficient humanitarian and compassionate grounds to justify the appeal under paragraph 67(1)*(c)* of the IRPA.

[8] The IAD dismissed her appeal by letter dated February 1, 2008.

Decision under Review:

[9] The IAD found that there was nothing in the newly submitted medical opinions which would lead it to conclude that the medical officer's assessment was unreasonable when it was made. The IAD relied on the Federal Court of Appeal's decision in *Mohamed v. Canada (M.E.I.)*, [1986] 3 F.C. 90 to conclude that the medical officer's diagnosis and opinion as to the consequences of Inder's condition were not unclear, ambiguous or unreasonable.

[10] The IAD did not accept Ms. Vashishat's contention that Inder will not require any sort of social services and stated that he would be eligible for programs focusing on the acquisition of basic living skills including vocational training. The IAD held that while the applicants might not, at this time, have the intention of using any of the social services for which Inder would be eligible, Inder will still have a right to these publicly funded services.

[11] The IAD also noted that Ms. Vashishat had not submitted or demonstrated that she is in a position to assume the full responsibility of the costs of the social services that will be necessary for her brother if he were admitted to Canada.

[12] In addition, the IAD assessed whether there were sufficient humanitarian and compassionate grounds to warrant the appeal. The IAD stated that Mr. Jalpat and Inder are well established in India and there is no evidence to suggest that they depend financially or emotionally on Ms. Vashishat. The IAD also considered the best interest of the child directly affected by the decision. While the

board conceded that Ms. Vashishat's two-year old daughter would benefit from her grandfather's presence, it found that she can visit him with her mother at any time.

[13] Lastly, the IAD noted Ms. Vashishat's testimony regarding the house she bought in a farming area big enough for all of them to live in and the arrangements she made for her brother to work on a farm. However, the IAD did not find these elements sufficient to grant special relief in light of the other evidence.

Issues:

[14] The applicants' concerns with the IAD decision can be reduced to the following issues:

a. What is the standard of review?

b. Did the IAD commit a reviewable error in determining that Inder would produce an "excessive demand" on social services?

c. Did the IAD properly consider all the evidence in assessing the humanitarian and compassionate grounds?

[15] I did not consider it necessary to call on the respondent to address the third issue at the hearing. From my review of the applicants' submissions, the Court was being asked to re-weigh the evidence in support of the humanitarian and compassionate grounds, a function which is not its role on judicial review. I advised counsel that I would not decide this matter on that basis.

Analysis:

Standard of Review

[16] As established in *Dunsmuir v. New Brunswick*, 2008 SCC 9, there are now only two standards of review: reasonableness and correctness. In *Dunsmuir*, the Supreme Court of Canada provided guidance regarding the process for determining the appropriate standard of review in a given case. The first step is to ascertain whether past jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question. Where this search proves fruitless, the Court should undertake an analysis of the four factors comprising the standard of review analysis. Conversely, if the outcome of that inquiry is fruitful, it is unnecessary to proceed with the analysis.

[17] This Court has on a number of occasions applied the standard of reasonableness to visa officer's refusals based on medical inadmissibility, and the same standard when reviewing the underlying medical opinion. In *Fei v. Canada (Minister of Citizenship and Immigration)* (T.D.), [1998] 1 F.C. 274, [1997] F.C.J. No. 950, Justice Heald referred to Dubé J. in *Gao v. Canada (Minister of Citizenship & Immigration)* (1993), 14 Admin. L.R. (2d) 233 (F.C.T.D.) who set out the standard of review in the following terms:

> Most of the case law relating to medical inadmissibility decisions by visa or Immigration Officers has issued from appellate bodies. The general principles arising from these cases are of course relevant to a judicial review application seeking to quash an Immigration Officer's decision.
>
> The governing principle arising from this body of jurisprudence is that reviewing or appellate courts are not competent to make findings of fact relating to the medical diagnosis, but are competent to review the evidence to determine whether the medical officers' opinion is reasonable in the circumstances of the case [Jiwanpuri; Deol]. The reasonableness of a medical opinion is to be assessed not only as of the time it was given, but also as of the time it was relied upon by the Immigration Officer, since it is

> that decision which is being reviewed or appealed [Jiwanpuri]. The grounds of unreasonableness include incoherence or inconsistency, absence of supporting evidence, failure to consider cogent evidence, or failure to consider the factors stipulated in s. 22 of the Regulations. [Footnotes omitted or abbreviated].

[18] In the present instance, the IAD reviewed the reasonableness of the visa officer's refusal of the applications on the basis of medical inadmissibility. The IAD's decision should be reviewed on a reasonableness standard. This Court will only intervene if the decision falls outside a range of possible, acceptable outcomes defensible on the facts and the law.

Did the IAD commit a reviewable error in determining that Inder would produce an "excessive demand" on social services?

[19] The applicants' main contention is that the IAD, in assessing the reasonableness of the visa officer's decision, failed to consider Inder's individual circumstances as required by the Supreme Court of Canada decision in *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, 2005 SCJ 58, [2005] S.C.J. No. 58 ("*Hilewitz*").

[20] According to *Hilewitz*, determinations of medical inadmissibility based on excessive demands require an individualized assessment of the person's condition, capabilities and actual needs, together with the availability of family support. The following excerpts of that decision are instructive for the purpose of this discussion:

> **54** Section 19(1)(*a*)(ii) calls for an assessment of whether an applicant's health would cause or might reasonably be expected to cause excessive demands on Canada's social services. The term "excessive demands" is inherently evaluative and comparative. Without

> consideration of an applicant's ability and intention to pay for social services, it is impossible to determine realistically what "demands" will be made on Ontario's social services. **The wording of the provision shows that medical officers must assess likely *demands* on social services, <u>not mere eligibility</u> for them**. [Emphasis added].
>
> **55** 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. [Emphasis added].
>
> **56** 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.
>
> **(…)**
>
> **60** Under this new provision, health impairments need no longer be those that "would cause or might reasonably be expected to cause" excessive demands. Only those that "might reasonably be expected to cause" them are relevant. I see no real significance to the omission of the words "would cause". The wording is sufficiently similar to preserve the requirement that **any anticipated burdens on the public purse be tethered to <u>the realities, not the possibilities, of applicants' circumstances</u>, including the extent of their families' willingness and ability to contribute time and resources**. [Emphasis added].
>
> **61** It follows from the preceding analysis that the Hilewitz and de Jong families' **<u>ability and willingness to attenuate the burden on the public purse</u>** that would otherwise be created by their intellectually disabled children are relevant factors in determining whether those children might reasonably be expected to cause excessive demands on Canada's social services. [Emphasis added].

[21] The applicants argue that both the visa officer and the IAD failed to conduct an individualized assessment of the applicants' particular circumstances. Specifically, the IAD failed to

consider Inder's capabilities and actual needs, the arrangements made for him in Canada to work on a farm and live with his family, and instead did a mechanistic assessment which fell short of the requirements of *Hilewitz*.

[22] The applicants submit that the issue of family support goes beyond the mere ability to pay for the required services. The focus should be on the family's willingness and ability to attenuate the potential burden and not on whether the family has the financial means of paying for the services. The applicants argue that the arrangements made for Inder in Canada negate the need to rely on social services.

[23] The applicants further submit that the IAD applied the wrong test in focusing on Inder's eligibility and entitlement to services in Canada rather than on the likelihood of demand. Instead, the IAD's decision mirrors the medical notation which simply identifies the services Inder would be *eligible for*. The applicants contend that there is an obvious difference between social services that Inder would be *eligible for* and those that he would use or might reasonably be expected to use if he were to come to Canada. It is not enough for the IAD to note the services that the applicant could have access to. What is required is an explanation of the services that the applicant would need or use or might reasonably be expected to need or use. The IAD's reasons are deficient, assert the applicants, because they were made without regard to the evidence and failed to communicate which social services Inder would require or might reasonably be expected to require.

[24] The respondent argues that the facts as presented by the applicant inevitably led to the conclusion that there would be an excessive demand. The respondent submits that the IAD

considered all of the evidence presented to it, but preferred the evidence of the medical officer which maintains that Inder's medical condition requires social services. The respondent contends that the IAD based its decision on the medical officer's opinion, which it found to be reasonable, and on the fact that the applicants have not demonstrated or suggested that they are in a position to pay for any of the recommended services.

[25] Paragraph 38(1)*(c)* of the IRPA reads:

38. (1) A foreign national is inadmissible on health grounds if their health condition … (*c*) might reasonably be expected to cause excessive demand on health or social services.	**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.

[26] This statutory provision requires an assessment of the health condition of a foreign national and of the resulting risk that person will cause excessive demand on social services. The very concept of "excessive demand" conveys the notion that a certain level of demand is acceptable and is no impediment to the admissibility of a foreign national: *Colaco v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 282 at paragraph 4 ("*Colaco*").

[27] In assessing the risk and extent of the demand on social services of an applicant, certain factors must necessarily be taken into consideration. At paragraph 55 of *Hilewitz,* Justice Abella noted that both medical and non-medical factors must be taken into account, 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. The Federal Court of Appeal applied that notion in *Colaco,* above. At paragraph 5 of that decision, Justice Létourneau wrote the following:

> In our view, in assessing both the risk of demand and the extent of that demand, the foreign national's ability and willingness to pay for the services are relevant factors to take into consideration. These factors are not necessarily conclusive or determinative in making the assessment, but they cannot be ignored because they may influence the level of risk and demand for social services support.

[28] Counsel for the applicants submits that *Colaco* does not stand for the proposition that there has to be evidence of an ability to pay for the services if there is some alternative means to provide the services. I agree. In his concluding analysis, Justice Létourneau in *Colaco* held that if a skilled worker applicant can establish that his or her admissibility in Canada cannot reasonably be expected to cause excessive demands on social services, there is no reason to exclude that applicant on that basis.

[29] As was also articulated by Justice Abella in *Hilewitz*, any anticipated burden on the public purse must be tethered to the realities of the applicants' circumstances, including the extent of the family's willingness and ability to contribute time and resources. Here, Inder's family stated that it was prepared to make alternative arrangements to provide employment for him on a farm which would attenuate any anticipated burden or excessive demand on social services. In its reasons, the IAD indicated that Ms. Vashishat had not submitted or demonstrated that she is in a position to

assume the “full responsibility of the costs of the social services that will be necessary for her brother”. Here, the IAD focused on the family’s ability to pay without taking into consideration the alternative arrangements they have made for Inder. I find the IAD did not properly consider the applicants’ actual circumstances in determining what “demands” will be made on Canada’s services.

[30] The applicants have also argued that the IAD applied the wrong test in focusing on eligibility and entitlement of services rather than on the likelihood of demand based on Inder’s condition. This issue was resolved in *Hilewitz*. At paragraph 54, Justice Abella remarked that the wording of the provision (now s. 38) indicates that medical officers must assess likely *demands* on social services, not mere *eligibility* for them. In its reasons, the IAD maintained that “the appellant might not, at this time, have the intention of using any of the social services for which her brother would be eligible; however, the applicant will have a right to these publicly funded services”. This rationale does not meet the threshold required for establishing that Inder’s medical condition would or might reasonably be expected to result in an excessive demand on social services.

[31] Accordingly, this application is allowed and the matter is to be sent back to another panel of the IAD for re-consideration. The parties proposed no question for certification when given an opportunity to do so and none will be certified.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is granted and the matter is remitted to another panel of the Immigration Appeal Division for re-consideration. No question is certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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