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Dockets: IMM-2831-08
IMM-2833-08

Citation: 2008 FC 1361

Ottawa, Ontario, December 9, 2008

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

JAYSON SANTOS VOLUNTAD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] The Applicant, Mr. Jayson Voluntad, is a citizen of the Philippines, who came to Canada under the Live-in Caregiver Program on January 8, 2005. In spite of being diagnosed with kidney disease within five months of his arrival, the Applicant was granted two subsequent renewals of his work permit, the last of which allowed him to stay in Canada until January 2008. The Applicant's second work permit renewal was issued on the condition that he undergo an immigration medical examination within 90 days.

[2] As a result of the Applicant's medical exam, a Citizenship and Immigration Canada (CIC) Medical Officer concluded that his health condition might reasonably be expected to cause excessive demand on health services and that his health condition might reasonably be expected to require health services, the costs of which would likely exceed the average Canadian per capital costs over five years. As a result, on January 23, 2008, the Applicant's third application for a further extension of his work permit was refused as he was found to be inadmissible to Canada on health grounds pursuant to s. 38(1) of the *Immigration and Refugee Protection Act*, 2001, c. 27 (IRPA).

[3] In normal circumstances, having completed 24 months of employment as a full-time live-in caregiver, the Applicant would have been eligible to apply to become a permanent resident under the live-in caregiver class (see Part 6, Division 3 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227). Due to his medical inadmissibility, this was not open to the Applicant. Accordingly, in May, 2007, the Applicant applied for permanent residence on humanitarian and compassionate (H&C) grounds. He also requested a temporary residence permit (TRP).

[4] In a decision dated June 17, 2008, an immigration officer (the Officer) found that the Applicant would not suffer unusual, undeserved and disproportionate hardship if required to apply for a permanent resident visa from outside Canada (the H&C decision) and rejected the Applicant's application for a TRP (the TRP decision).

[5] The Applicant seeks judicial review of the decision.

II. Issues

[6] This application raises the following issues:

1. Did the Officer render an unreasonable H&C decision by virtue of:

    a. Her consideration of the availability of medical treatment to the Applicant in the Philippines?

    b. Her consideration of the Applicant's establishment in Canada?

2. Does the Live-in Caregiver Program violate s.15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the *Charter*)?

3. Did the Officer breach procedural fairness by failing to provide sufficient reasons for refusing the TRP?

III. Analysis

A. *Standard of Review*

[7] Both parties agree that the decision of the Officer is reviewable on a standard of reasonableness, meaning that the task of the Court is to determine "whether the decision falls within

a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47). It is also important to note that, on this standard of review, the Court ought not to substitute its discretion for that of the Officer, even if the Court might have drawn different inferences or reached a different conclusion.

[8] This standard does not apply to the alleged insufficiency of the reasons for the TRP decision; no deference is owed for a breach of procedural fairness.

B. *Medical Treatment in the Philippines*

[9] The Applicant submits that the Officer erred in refusing the H&C application by ignoring the Applicant's evidence that he did not have reasonable access to health care in the Philippines due to the high cost of treatment for kidney disease, poor public health care funding, the remoteness of his community in the Philippines, his financial incapacity to relocate and his inability to resume employment in the Philippines. Further, the Applicant asserts that the Officer erred in finding that medical treatment was available to the Applicant in the Philippines merely because a health care system existed. In his view, in finding that there was insufficient evidence to show that the medical care was inaccessible to the Applicant, the Officer clearly preferred the opinion of Medical Officer John Lazarus without providing any rationale for rejecting the Applicant's evidence that he would not be able to afford treatment in the Philippines.

[10] Having reviewed the record before the Court, I am satisfied that the Officer carefully considered all of the evidence before her – both that submitted by the Applicant and that of a medical officer at the Manila consulate. Although specific e-mails were not provided to the Applicant, the evidence itself and its source were disclosed to the Applicant in the fairness letter, dated March 28, 2008 and provided to the Applicant. Based on the evidence, the Officer concluded that there was insufficient evidence to conclude that the Applicant would not be able to continue to manage his disease upon returning to the Philippines. Specifically, she found:

- Treatment and medication was available in the Philippines for the Applicant's illness.

- Though it may be inconvenient and disruptive to his employment to have to commute from Bulacan to Manila for treatment, this situation was not unlike that faced by others around the world who lived in small communities at some distance from a hospital.

- The Applicant was on peritoneal dialysis, which he was able to administer at home on his own schedule. There was insufficient evidence that he could not continue this form of treatment in the Philippines rather than having to travel to a hospital. The Applicant also had the option of moving closer to a hospital if he returned to live in the Philippines.

- There was insufficient evidence as to the Applicant's annual income in Philippines.

- There was insufficient evidence that the Applicant would not qualify for coverage under the National Health Insurance Program (NHIP).

- There was insufficient evidence to show that the Applicant would not be eligible, if he became indigent, to receive funding from the Philippine Charity Sweepstakes Officer (PSCO). Nor was there evidence that the Applicant would not eligible for subsidies under the indigent component of the NHIP

[11] In my opinion, the Officer did not ignore any of the evidence that was submitted by the Applicant. Her conclusion with respect to the availability of medical treatment flowed from a careful analysis of the evidence before her – evidence that indicated that medical treatment was available in the Philippines and that various sources of funding may have been available to the Applicant. Although the Applicant had submitted opinion letters from his friends stating that medical treatment was expensive in the Philippines and that "only rich people are able to afford dialysis treatment", he failed to provide sufficient evidence that he would not be able to access different sources of funding that were available in the Philippines.

[12] In sum, the Officer properly weighed the evidence before her and reached a conclusion that fell, in my opinion, within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, above, at para. 47).

C. *Establishment in Canada*

[13] The Applicant asserts that the Officer applied an "arbitrary" standard on the Applicant in assessing his degree of establishment in Canada. In his submission, the Officer erred by failing to consider his establishment within the context of his particular circumstances. Specifically, she failed to consider that in spite of his chronic illness, the Applicant continued working and integrated into his community. The Applicant refers to the portion of the Officer's decision, where she states that "as the holder of a work permit for three years, it is only to be expected that Mr. Voluntad would have achieved a level of establishment and integration in Canada."

[14] The extract cited by the Applicant is contained in a lengthier passage dealing with the degree of establishment. The Officer wrote in her decision:

> Since his arrival to Canada, Mr. Voluntad has been continuously employed for his sister as a live-in caregiver. He speaks, reads and writes English. Mr. Voluntad is actively involved with his church. He has worked as a volunteer at the school of his nephew and niece. Letters have been submitted by Mr. Voluntad from supporters of his application who include health care professionals, friends, a social workers and an MP. I acknowledge that Mr. Voluntad has been self-sufficient in Canada. I recognize his efforts to integrate in the community through his friendships, church, and volunteer work. While I acknowledge his establishment in Canada, I note that as the holder of a work permit for three years, it is only to be expected that Mr. Voluntad would have achieved a level of establishment and integration in Canada. His establishment, while commendable, is not in my opinion a sufficient factor to warrant a visa exemption or an exemption from the selection criteria related to becoming a permanent resident from within Canada.

[15] Having reviewed this portion of the decision, I am satisfied that the Officer provided a thorough analysis of the degree of the Applicant's establishment in Canada. No evidence was ignored. The Applicant questions, in effect, the weight that was given to his establishment. Although the Officer found that the establishment was commendable, it was insufficient to justify granting the H&C application. This was, in my opinion, a conclusion that is supported by the evidence. There is no reviewable error.

D. *Charter violation*

[16] The Applicant submits that the live-in caregiver program violates s.15 of the *Charter*. In his submission, while the admissibility of applicants in other economic classes is fully determined before entry to Canada, live-in caregivers must undergo admissibility screenings both before entry and upon completion of their work requirement as live-in caregivers. This, in his view, constitutes differential treatment of live-in caregivers on the basis of occupation. The Applicant submits that this is an analogous ground under s.15 and that the differential treatment constitutes discrimination.

[17] Section15 of the *Charter* states that:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[18] The framework of analysis for an alleged infringement of s.15 of the *Charter* was set out in *Law v. Canada*, [1999] 1 S.C.R. 497. The Applicant must prove that:

i. he received differential treatment under law;

ii. the differential treatment was based on an enumerated or analogous ground; and

iii. the differential treatment constitutes discrimination.

[19] In my view, the Applicant fails at the first step of the analysis. The Applicant's argument, in this regard, is based on a misapprehension of the status of a live-in caregiver in Canada. By definition, the live-in caregiver program gives temporary – not permanent – status to the person. To obtain permanent residence in Canada, the live-in caregiver must apply separately for such status, at which time he must meet the relevant criteria for acceptance, just like every other applicant for permanent residence.

[20] The fact that a live-in caregiver was required to meet certain admissibility requirements upon his temporary entry to Canada, and then to demonstrate that he met some or all of the same requirements for application as a permanent resident, is simply not relevant. Upon application for permanent residence, the Applicant was treated exactly the same as any other applicant for permanent residence. There is no differential treatment.

[21] Even if I am prepared to accept that there is differential treatment by virtue of the admissibility requirements placed upon foreign nationals in the live-in caregiver class, I am not convinced that this differential treatment is based on an enumerated or analogous ground. There is no jurisprudence indicating that an occupation is an analogous ground: indeed, the case law is to the opposite effect (see *R. v. Alrifai*, 2008 ONCA 564, [2008] O.J. No. 2870 (Q.L.) at para. 29; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 at para. 44; and *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673 at paras. 65-66).

E. *TRP decision*

[22] The Applicant submits that, in refusing the TRP request, the Officer failed to give sufficient reasons as to why she was not satisfied that the Applicant's need to remain in Canada was compelling and sufficient to overcome the health risk to Canadian society.

[23] While it is true that the refusal of the TRP was dealt with in one paragraph of the Officer's decision, the TRP decision cannot be read in isolation. In the present case, the Applicant sought permanent residence on H&C grounds based on his establishment in Canada, the unavailability of medical treatment in the Philippines and the best interests of his niece and nephew. The Applicant

relied on these same factors with respect to his request for a TRP. The main submission in his counsel's written representations to the Officer is:

> In the event that this application for landing is denied on H&C grounds, we submit that Jayson should be allowed to remain in Canada in spite of his inadmissibility.
>
> …
>
> Jayson's case is unique in that he has already made a significant economic contribution to Canada over the last two years. Before Jayson's application for permanent residence is refused, we submit that he should be considered for a temporary resident permit.

[24] Given that the Applicant's request for a TRP relied on the same grounds as those of his H&C application, it was proper for the Officer to base her conclusions with respect to both the H&C and the TRP on the same analysis. A failure to issue a separate set of reasons for the TRP in the present circumstance cannot constitute a breach of procedural fairness if the Applicant himself has not advanced any arguments which merit a separate analysis.

[25] Moreover, given the exceptional nature of the TRP request, the deference to be afforded to an officer in making this decision, and the lack of any additional evidence to suggest that the Applicant's case was compelling, I find no reason to conclude that the Officer's decision was unreasonable.

IV. Conclusion

[26] This is an unfortunate situation for the Applicant. While I might have decided differently, I cannot find grounds upon which to intervene in the discretionary decision of the Officer.

[27] For these reasons, the application for judicial review will be dismissed. Neither party proposed a question for certification; none will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is dismissed;

2. no question of general importance is certified; and

3. this decision be filed in both dockets IMM-2831-08 and IMM-2833-08.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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