Federal Court  Cour fédérale

Date: 20090825

Docket: IMM-5704-08

Citation: 2009 FC 842

Ottawa, Ontario, August 25, 2009

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

TETYANA BARNASH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"). The Applicant asks this Court to review a decision from the Immigration Appeal Division (the "IAD") of the Immigration Review Board under section 67(1)(a) and (c) of *IRPA*.

[2] Tetyana Barnash ("the Applicant") sponsored an application for permanent resident visas on behalf of her parents, Klara Urman (her mother) and Illya Urman (her father). That application was rejected September 20, 2006 due to the health care restrictions arising from the Urmans' diagnoses of heart disease as per section 38(1)(c) of *IRPA*. The Applicant appealed and the IAD dismissed her appeal on December 16, 2008 for similar reasons. Ms. Barnash now applies for judicial review of the IAD decision.

Facts

[3] The Applicant comes from a close knit family in the Ukraine. Tetyana Barnash, daughter of Klara and Ilya Urman lived under the same roof as her parents for most of her life. When Tetyana married, her husband Vitaly moved in. They had a son, Alex, who also stayed in the home for the first part of his childhood. In 2000, the Applicant, Vitaly and Alex, left for Canada. Olena Urman, Tetyana's sister, followed in 2003.

[4] In 2003, Ms. Barnash sponsored her parents' application to become permanent residents of Canada. She wishes to reunify her family and provide her son with the benefit of care and attention from his grandparents, including the desire he become familiar with his heritage.

[5] Ms. Barnash has successfully pursued training as a practitioner of Chinese Medicine and Acupuncture. Her husband is employed and earns a good salary. Together they purchased a three bedroom house in Vaughn, Ontario which they occupy with Olena Urman. They say it is well

equipped and it was chosen in anticipation of housing the elder Urmans. In the meantime, the family keeps in touch regularly via telephone, the internet and by letter.

[6] Klara and Illya Urman's application for permanent resident status was refused on medical grounds: namely heart conditions. Both Klara and Illya Urman are diagnosed with coronary atherosclerosis.

[7] Three doctors have considered the older couple's health, Doctor Marilyn Cooper who was at the time the Regional Medical Officer at the Canadian Embassy in Vienna, Doctor Ted Axler who conducted Immigration Medical Assessments for Canada and is a family practitioner in Toronto and Doctor Irina Knyazkova, a Cardiologist and Professor at the Kharkiv State Medical University in the Ukraine.

[8] Klara Urman is diagnosed with ischemic heart disease, stable angina functional class II, hypertension stage II, heart failure of class 2 to 3 out of 4. She has been hospitalized for this condition, twice in 2005.

[9] Illya Urman is diagnosed with ischemic heart disease, stable angina functional class II, cardiosclerosis due to post infarction, hypertension stage III, heart failure functional class II.

[10] The Medical Officer, Doctor Cooper, concluded the Urmans' conditions would deteriorate and result in using expensive health services that are also in high demand.

[11] Doctor Axler disputed this finding. He contended family support should have been factored into the probability of a deterioration of the elder Urman's health. More support, he says, would result in fewer problems. He adds a change in lifestyle and diet resulting from a move to Canada would also favour the Urmans' chances of avoiding serious health complications. Finally, he argues the Urmans are likely to benefit from an inexpensive course of pharmaceutical treatment to control their blood pressure.

[12] Doctor Knyazkova suggested the patients will remain stable for the next 5-6 years if they follow their courses of treatment.

Decision Under Review

[13] Both the Immigration and Refugee Board and the Immigration Appeal Division found the medical evidence concerning the elder Urmans indicating the demand for services connected to their ailments triggered the inadmissibility requirements of section 38(1)(c) of *IRPA*.

[14] The IAD considered reasons for granting special relief from the medical inadmissibility finding pursuant to Section 67(1)(c) of *IRPA*. It recited the family's history, the younger generation's progress in Canada and the living conditions of the elder Urmans. It reiterated Canada's stated goal of family reunification, but concluded at paragraph 36:

> "The panel weighed the legislative goal of family reunification against the statutory bar to the admission of the applicant and her husband on medical grounds. The extent of the statutory bar is high."

[15] The IAD also briefly considered the best interest of the child.

[16] The IAD dismissed the appeal concluding the Appellant had not established sufficient humanitarian and compassionate considerations to warrant special relief pursuant to Section 67(1)(c) of *IRPA*.

Issues

[17] The issues arising on this appeal are:

1. Was the IAD's conclusion concerning the inadmissibility requirements of 38(1)(c) of *IRPA*, reasonable?

2. Did the IAD err in its assessment of humanitarian and compassionate considerations to grant special relief pursuant to section 67(1)(c) of *IRPA*?

3. Did the IAD fail to observe procedural fairness by failing to give reasons for denying the Applicant's submissions on judicial review of humanitarian and compassionate grounds?

Standard of Review

[18] The consequence of the elder Urman's heart disease is a finding of fact by the Medical Officer. This finding was relied upon by the Immigration Officer and the IAD.

[19] Justice Dubé considered the standard of review in such cases in *Gao v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 114:

> 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 related 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. *Canada (M.E.I.) v. Jiwanpuri* (1990), 109 N.R. 293 (F.C.A.). 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 section 22 of the Regulations. [some citations removed].

[20] Given the specialized nature of a medical opinion, reasonableness is the appropriate standard of review for this part of the IAD decision.

[21] On the issue of special relief on humanitarian ground, it is well settled in *Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817,and supported in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 that the proper standard of review in humanitarian and compassionate considerations is reasonableness. For a breach of procedural fairness, the standard of review is correctness.

Analysis

Was the Panel's conclusion concerning inadmissibility requirements of 38(1)(c) of IRPA reasonable?

[22] The Applicant argues the IAD overlooked or ignored certain facts about the health of the elder Urmans. Specifically, the Applicant argues the IAD overlooked medical evidence that Klara Urman's condition over the last few years has been stable. The letter of Doctor Knyazkova provided a prognosis that Klara Urman does not require surgical intervention or intensive therapy and her condition was stable during the past three years.

[23] The Applicant submits that Klara Urman's stable condition rebuts the excessive demands limb of the medical inadmissibility test.

[24] The Medical Officer's opinion need not show the elder Urmans' medical evidence conclusively shows that they would make excessive demands on the health system. Section 38(1)(c) of *IRPA* provides:

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

[25] Excessive demand is defined in section 1(1) of the *IRPA Regulations* as:

> (a) demand on health services or social services for which the anticipated costs would likely exceed average Canadian per capita health services and social service 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 the 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.

[26] In *Sirbu v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 449, Justice Teitelbaum considered the reviewable elements of a medical opinion. He took guidance from *Masood v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1411 which refers to *Fei v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 F.C. 274 "…where the medical officer's report includes a patently unreasonable error of fact or was generated in a manner contrary to principles of natural justice, then the visa officer's reliance on that report constitutes an error of law."

[27] Doctor Cooper had reviewed the new medical information provided after fairness letters were sent giving the elder Urmans the opportunity to provide further medical information. The Medical Officer did not ignore the new evidence nor did she make any unreasonable error of fact since the medical opinions of the three doctors all confirm the same underlying diagnosis.

[28] Doctor Cooper considered significant the likely need for Klara Urman, based on her current state of health, for repeated emergency room use and hospital admissions for angina and congestive heart failure. This consideration was not addressed in Doctor Knyazkova's medical prognosis stating that Klara Urman would not require surgical intervention or intensive therapy. Doctor Cooper reasonably concluded Klara Urman would likely place excessive demands on the Canadian health care system.

[29] On appeal, the IAD took note of Doctor Knyazkowa's medical report and of her medical prognosis including her stable condition which was compensated and well controlled by remedies.

[30] The IAD accepted Doctor Cooper's assessment. She had reviewed new information, and maintained her opinion that the elder Urmans would each likely cause excessive demand on health services as contemplated by section 38(1)(c) of *IRPA.* The IAD made a straightforward and reasonable conclusion drawn from the specialized medical opinions available. The Medical Officer had not ignored the Applicant's medical evidence, neither did the IAD.

[31] The Applicant does not succeed on this ground.

Did the Panel err in its assessment of humanitarian and compassionate considerations to grant special relief pursuant to section 67 (1)(c) of IRPA?

[32] Ms. Barnash also submits that the IAD erred by failing to consider whether undue, undeserved or disproportionate hardship would result to the Applicant and her close family members.

[33] Finally, Ms. Barnash submits the IAD breached procedural fairness by failing to give reasons for rejecting the Applicant's submissions on humanitarian and compassionate grounds.

[34] The IAD carefully listed all of the considerations submitted by the Applicant concerning humanitarian and compassionate grounds for special relief under section 67(1) (c) of *IRPA.* It stated:

> The panel weighed the legislative goal of family reunification against the statutory bar to admission of the applicant and her husband on medical grounds. The extent of the statutory bar is high.
>
> Taking into consideration the best interests of a child directly affected by the decision, the applicant has not established sufficient humanitarian and compassionate considerations to warrant the granting of special relief. The appeal is therefore dismissed.

[35] While its reasoning is scant, it is clear the IAD weighed the merits of family reunification against what it considered a high bar to admission when medical grounds against admission are established. In that weighing, the humanitarian and compassionate considerations, raised in respect of a request for discretionary relief, did not overcome an express statutory medical bar. The IAD reasoning, albeit brief, is both reasonable and sufficient to explain why it denied the elder Urmans special relief under section 67(1) (c).

[36] Finally, it is clear on the evidence the family is attached and affectionate. While the IAD did not decide for special relief in the application for permanent residence, it did not question the familial considerations advanced in the appeal. It also would appear the Applicant and other adult family members personally attended the judicial review hearing.

[37] I must note that attached to the letter to Ms. Barnash advising her of her right to appeal to the IAD are copies of letters from the Visa Officer to the elder Urmans informing them of the decision refusing their application for permanent resident visas to Canada on health grounds. These letters expressly caution them about applying for a visitor's visa. It seems to me such caution is premature since different considerations arise on an application for a visitor's visa.

[38] I referred above to the decision of Mr. Justice Teitelbaum in *Sirbu v. Canada (Minister of Citizenship and Immigration)* supra which considers a very similar set of facts. Justice Teitelbaum stated in his decision: "I also add that the respondent should do all in its power to grant the applicant's parents a visitor's visa to visit the applicant and the grandchildren."

[39] I would make a similar recommendation in this case.

Conclusion

[40] The application for judicial review is denied.

JUDGMENT

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.

2. No general question of importance is certified.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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