

Federal Court



Cour fédérale

Date: 20100622

Docket: IMM-4435-09

Citation: 2010 FC 682

Ottawa, Ontario, June 22, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ROSALINA AGUINALDO

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] Ms. Aguinaldo, a citizen of the Philippines, has been working for the past several years as a nurse at the hospital in La Loche, some 600 kilometres north of Saskatoon.

[2] There is a great shortage of nurses in northern Saskatchewan, so much so that often she is the only nurse on duty and consequently works significant overtime in order to keep the hospital open. Otherwise, patients would have to be transferred by air or road ambulance to Saskatoon.

[3] Due to the shortage, her holiday leaves are often denied. During the past several years, she has spent only 37 days with her husband and young son, Jon, in the Philippines. She applied for permanent resident status so that her husband and her son could immigrate to Canada.

Unfortunately, Jon has autism spectrum disorder. A visa officer denied her application as section 38(1) of the *Immigration and Refugee Protection Act* provides that a foreign national is inadmissible on health grounds if his or her conditions might reasonably be expected to cause excessive demand on health or social services. By virtue of s. 42, this inadmissibility extends to the whole family: if one family member might reasonably be expected to cause such excessive demand, then other family members, such as parents in this case, are also inadmissible.

[4] A doctor with the Regional Medical Office in Ottawa issued a medical notification based, to some measure, on a report she had received from Jon's doctor in the Philippines, that his medical condition is chronic and that he requires special educational services, the cost of which would likely exceed the average Canadian per capita cost over five years.

[5] The file indicates that depending on an assessment of his condition here, the annual cost, calculated today, might run from \$6,000 to \$12,000 a year. However no analysis was done as to the average Canadian cost of social services.

[6] The visa officer, in an affidavit issued after leave for judicial review was granted, endeavoured to justify his decision by referring to matters which were not in his CAIPS notes. In particular he said:

Upon reviewing the information provided by the Applicant, on the surface, it appeared the Applicant had demonstrated an ability to pay the additional costs associated with her medically inadmissible son. However, upon review of the entire file, it became apparent that the Applicant's intentions with respect to where the Applicant and her family intended to reside were either contradictory or unclear. This issue became important in considering the Applicant's ability to pay the extra costs related to her son's medical condition. My concern was that if the Applicant chose to reside in Saskatoon with her family, her income would be substantially compromised, as it was noted that a large portion of her current income was overtime, which she could only earn due to the shortage of nursing staff in northern Saskatchewan.

In the Applicant's material, it was unclear if her intention was to have her family reside in Saskatoon while she remained in La Loche or whether she intended to relocate to Saskatoon with her family. If the Applicant were to reside in La Loche while her family resided in Saskatoon, the financial burden of keeping two households would severely compromise her ability to pay any additional educational or medical costs.

[7] Although a fairness letter had been given to Ms. Aguinaldo to address the visa officer's concerns with respect to Jon's medical condition, no opportunity was given to her to deal with his concerns as to her financial ability to pay and, more specifically, as to how her plans concerning where she and her family would live would affect that ability. Following the Supreme Court's decision in *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706, the ability to pay for social services, including special education needs, must be taken

into consideration when assessing whether someone is medically inadmissible. Ms. Aguinaldo put forth a series of possibilities. One was that Jon and her husband would reside in Saskatoon where Jon could attend a private school. Another is that Ms. Aguinaldo's husband has been taking special courses and would soon be in position to homeschool Jon.

[8] The concern that Ms. Aguinaldo might move to Saskatoon, which would compromise her income (and therefore her ability to pay for social services for Jon) since she would not have the same amount of overtime, is outright speculation. It is also speculation that if the family resided in La Loche that Jon would be sent to a public school.

[9] Furthermore, it does not follow from these assumptions that the family could not bear the expense should she continue to work in La Loche and her husband and son would live in Saskatoon. No inquiry whatsoever was made as to her current cost of living in La Loche, and what the cost of living would be in Saskatoon. The record indicates that she has been earning around \$150,000 per year in La Loche. There is nothing in the record to suggest that that would not be sufficient income to maintain a household for her husband and son in Saskatoon and a separate residence for herself in La Loche, and pay for Jon's social services and for travel between La Loche and Saskatoon.

[10] This decision, made without an evidentiary basis, was procedurally unfair. It follows that judicial review must be granted as the Court itself is not entitled to speculate as to what might have happened had these concerns been raised (*Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643).

[11] During the hearing, I pointed out that I considered this matter to be very sterile.

Ms. Aguinaldo's application is supported by the Government of Saskatchewan! The costs associated with excessive demand on social services would primarily be borne by the province, a province which, according to its own elected Minister Responsible for Immigration, would find it less expensive to finance Jon's special needs, if such there be, rather than incur greater expense in transporting patients to Saskatoon.

[12] I refuse to accept that Canadian immigration law is so rigid as to deny the inhabitants of a northern community the services of a desperately-needed nurse because her son's condition may pose a demand on social services that the applicable payor government would, if necessary, be happy to absorb. Our immigration law creates at least three possible paths to a favourable outcome. First, she may have the ability and intent to offset those costs, per *Hilewitz*. Second, section 24 of IRPA allows an officer to issue a Temporary Resident Permit which can lead to permanent residence. Finally, section 25 of IRPA allows the Minister to grant a foreign national permanent resident status or an exemption from any applicable criteria, if of the opinion that such is justified by humanitarian and compassionate considerations, taking into account the best interest of the child directly affected. Is it in Jon's best interest that he only be able to see his mother a few weeks a year? Is it in the best interests of the community of La Loche, which desperately needs Ms. Aguinaldo's services, that she pack up her bags in frustration and go home to her family?

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The application for judicial review is allowed.
2. The decision of the visa officer is quashed and the matter is remitted to another visa officer for a fresh determination.
3. There is no serious question of general importance to certify.

“Sean Harrington”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4435-09

STYLE OF CAUSE: Aguinaldo v. MCI

PLACE OF HEARING: Saskatoon, Saskatchewan

DATE OF HEARING: June 17, 2010

**REASONS FOR ORDER
AND ORDER:** HARRINGTON J.

DATED: June 22, 2010

APPEARANCES:

Haidah Amirzadeh

FOR THE APPLICANT

Michelle Baldwin

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Haidah Amirzadeh
Barrister & Solicitor
Saskatoon, Saskatchewan

FOR THE APPLICANT

Myles J. Kirvan
Deputy Attorney General of Canada
Saskatoon, Saskatchewan

FOR THE RESPONDENT