Federal Court  Cour fédérale

**Date: 20120119**

**Docket: IMM-4013-11**

**Citation: 2012 FC 75**

**Toronto, Ontario, January 19, 2012**

**PRESENT: The Honourable Madam Justice Mactavish**

**BETWEEN:**

**ISMAILA ADEBAYO ADEWUSI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] Ismaila Adebayo Adewusi seeks judicial review of the decision of an immigration officer refusing his application for permanent residence as a member of the investor class on the grounds that he is medically inadmissible to Canada. The immigration officer found that Mr. Adewusi suffers from a health condition that would be likely to cause excessive demand on the Canadian health system.

[2] At the conclusion of the hearing, I advised the parties that I would be allowing the application. These are my reasons for that decision.

**The Breach of Procedural Fairness**

[3] In *Sapru v. Canada (Minister of Citizenship and Immigration)*, 2011 FCA 35, , 413 N.R. 70, the Federal Court of Appeal described the respective responsibilities of medical officers and immigration officers when considering potential medical admissibility under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, and the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[4] Insofar as the role of medical officers is concerned, *Sapru* teaches that medical officers must provide immigration officers with medical opinions regarding any health condition that an applicant may have, as well as the likely cost of treating that condition. Where an applicant provides the immigration officer with a plan for managing the condition, the plan must be examined by the medical officer, who must then advise the immigration officer with respect to matters such as the feasibility of the plan: *Sapru* at para. 36.

[5] The role of the immigration officer is to determine the reasonableness of the medical officer's opinion: *Sapru* at para. 37. At the time that an immigration officer makes his or her decision on the admissibility of an applicant, the officer must have sufficient information from the medical officer so as to allow the officer to be satisfied that the medical opinion is reasonable: *Sapru* at para. 43.

[6] The respondent acknowledges that in this case, the immigration officer made a final decision in relation to Mr. Adewusi's medical inadmissibility prior to receiving an opinion from a medical officer addressing the substantial medical evidence and submissions filed by Mr. Adewusi in response to a fairness letter.

[7] This was a clear breach of the process mandated by *Sapru*. The immigration officer is not a medical expert. When the immigration officer made a final decision with respect to Mr. Adewusi's application without the benefit of a proper assessment of his supplementary submissions by a qualified medical officer, the immigration officer denied Mr. Adewusi the type of individualized medical assessment mandated by *Sapru* and by decisions such as *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706.

**The Appropriate Remedy**

[8] As a general rule, a breach of procedural fairness will void the hearing and the resulting decision: see *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643, [1985] S.C.J. No. 78 (QL). The Supreme Court of Canada observed in *Cardinal* that the right to a fair hearing is "an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have": at para. 23. The Court went on in the same paragraph to observe that "[i]t is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a [fair] hearing".

[9] There is a limited exception to this rule. That is, a reviewing court may disregard a breach of procedural fairness "where the demerits of the claim are such that it would in any case be hopeless":

*Mobil Oil Canada Ltd. et al. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, [1994] S.C.J. No. 14 (QL) at para. 53. See also *Yassine v. Canada (Minister of Employment and Immigration)* (1994), 172 N.R. 308 at para. 9 (F.C.A.). This situation may arise where, for example, the circumstances of the case involve a legal question which has an inevitable answer: *Mobil Oil* at para. 52.

[10] The respondent argues that nothing would be served by quashing the immigration officer's inadmissibility decision and remitting the matter for re-determination. According to the respondent, the outcome of Mr. Adewusi's application for permanent residence will inevitably be the same.

[11] In support of this argument, the respondent relies on affidavits filed by the immigration and medical officers involved in assessing Mr. Adewusi's application.

[12] The medical officer's affidavit reviews the supplementary submissions filed by Mr. Adewusi in response to a fairness letter. The officer states that this additional information did not change his original conclusion that Mr. Adewusi suffers from a serious health condition that would be likely to cause significant demand on the Canadian health system.

[13] The immigration officer's affidavit refers to the opinion that was provided by the medical officer shortly after the immigration officer made his decision refusing Mr. Adewusi's application for permanent residence. The immigration officer says that had he reviewed that opinion prior to making the decision under review, he still would have found Mr. Adewusi to be medically inadmissible.

[14] As a general rule, applications for judicial review are to be conducted on the basis of the record that was before the original decision-maker. Additional evidence may be admissible on an application for judicial review where, as here, an issue arises with respect to the fairness of the process that was followed in arriving at the decision under review.

[15] However, this is a narrow exception. It does not allow a party to adduce affidavit evidence on an application for judicial review in an effort to bolster its position by attempting to cure a defect in the decision-making process.

[16] The immigration officer's affidavit is proper to the extent that it acknowledges the procedural error that was made in this case and attempts to explain how it occurred. However, I am not prepared to accord any weight to the portions of the affidavit in which the immigration officer speculates as to how he would have decided Mr. Adewusi's application for permanent residence had he had the proper medical information before him.

[17] Insofar as the medical opinion contained in the affidavit of the medical officer is concerned, it is not for this Court to decide whether the medical officer's opinion is reasonable. That is the responsibility of an immigration officer in carrying out an admissibility determination.

[18] Moreover, the medical officer's affidavit provides reasons for confirming his original assessment of Mr. Adewusi's medical admissibility which do not appear in the assessment completed by the medical officer shortly after the immigration officer's decision to refuse Mr.

Adewusi's application for permanent residence. No weight should be given to this affidavit to the extent that it seeks to provide additional reasons for affirming the medical officer's original assessment of Mr. Adewusi's medical condition.

[19] The submissions provided by Mr. Adewusi in response to the fairness letter raise a question as to the accuracy of the medical officer's diagnosis and prognosis. In addition to providing several additional medical reports that were not before the medical officer when he made his original assessment, Mr. Adewusi also highlighted the diverging diagnoses that he had received from his doctors, his continuing lack of symptoms, and the fact that his condition had not deteriorated over time. These factors potentially call into question the accuracy of the medical officer's original diagnosis.

[20] As a result, I cannot say at this point that Mr. Adewusi's application for permanent residency is doomed to failure. The immigration officer's decision will therefore be set aside, and the matter will be remitted to a different immigration officer and a different medical officer for re-determination.

**Costs**

[21] Counsel for Mr. Adewusi submits that the breach of procedural fairness in this case was so self-evident that an order of costs should be made in his favour. He further submits that the explanation provided in immigration officer's affidavit for the error that occurred in this case is misleading, and is not credible in light of documents appearing in the tribunal record.

[22] Costs are not ordinarily awarded in immigration proceedings in this Court. Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 provides that "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".

[23] The threshold for establishing the existence of "special reasons" is high, and each case will turn on its own particular circumstances: *Ibrahim v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1342, [2007] F.C.J. No. 1734 (QL) at para. 8.

[24] This Court has found special reasons to exist where one party has acted in a manner that may be characterized as unfair, oppressive, improper or actuated by bad faith: see *Manivannan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1392, [2008] F.C.J. No. 1754 (QL) at para. 51.

[25] "Special reasons" have also been found to exist where there is conduct that unnecessarily or unreasonably prolongs the proceedings: see, for example, *John Doe v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 535, [2006] F.C.J. No. 674 (QL); *Johnson v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1262, [2005] F.C.J. No. 1523 (QL) at para. 26; and *Qin v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1154, [2002] F.C.J. No. 1576 (QL). In my view, this is not such a case.

[26] The fact that an immigration application for judicial review is opposed and the tribunal is subsequently found to have erred does not, by itself, give rise to a "special reason" justifying an

award of costs. I am not satisfied that the decision of the respondent to defend this application was so unreasonable as to entitle Mr. Adewusi to an award of costs.

[27] I am also not prepared to make a finding of misconduct on the part of the immigration officer on the strength of the record before me. An allegation that a government official has provided misleading information under oath in a judicial proceeding is a very serious allegation, and a person accused of such misconduct must have a fair opportunity to respond to the allegations against him or her.

[28] While Mr. Adewusi has raised questions with respect to the immigration officer's explanation for the error that occurred in the processing of this case, he chose not to cross-examine the officer on his affidavit. As a result, Mr. Adewusi's concerns were never put to the officer, and the officer has never been afforded an opportunity to address them.

[29] I am therefore not persuaded that this is an appropriate case for costs.

**Conclusion**

**[30]** For these reasons, I have concluded that the application for judicial review should be allowed.

**Certification**

[31] Neither party has suggested a question for certification, and none arises here.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

1. This application for judicial review is allowed and Mr. Adewusi's application for permanent residence is remitted to a different immigration officer and a different medical officer for re-determination; and

2. No serious question of general importance is certified.

"Anne Mactavish"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-4013-11 |
| **STYLE OF CAUSE:** | ISMAILA ADEBAYO ADEWUSI v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | January 17, 2012 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | MACTAVISH J. |
| **DATED:** | January 19, 2012 |

**APPEARANCES:**

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| Martin Anderson | FOR THE RESPONDENT |

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