Federal Court  Cour fédérale

Date: 20120202

Docket: IMM-4943-11

Citation: 2012 FC 133

Ottawa, Ontario, February 2, 2012

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

MAHESH PARMAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board (the Board), dated July 14, 2011, refusing the applicant's appeal from a denial of permanent resident visas to his parents in India.

Factual Background

[2] The applicant, Mahesh Parmar, is a citizen of India and a permanent resident of Canada, having been sponsored by his wife. In 2004, the applicant filed an application to sponsor his parents, nationals of India.

[3] While the application was being processed, the applicant's father, Inderjit Singh Parmar (the father), was diagnosed with Ischemic Heart Disease. The Officer determined that this condition would be reasonably expected to cause excessive demands on the health care system, and therefore the father may be inadmissible pursuant to section 38(1)(*c*) of the Act. The Officer sent a letter to the father, dated January 30, 2009, summarizing the potential inadmissibility and providing 60 days to respond.

[4] The father responded with a letter dated March 12, 2009, attached to which were the results of a cardiac angiography. The Officer found no information in this response to support a re-evaluation of the father's diagnosis. Therefore, the father was found inadmissible and the application was refused on June 10, 2009.

[5] The applicant appealed the decision to the Board. Counsel for the applicant indicated that the applicant would not contest the legal validity of the diagnosis, but rather would ask for special relief on humanitarian and compassionate grounds pursuant to section 67(1)(*c*) of the Act. In support of the appeal, the applicant submitted a letter from Dr. K.S. Hayer dated March 28, 2010 (the Hayer Report) (Applicant's Record, p 137), which provided her opinion on the prognosis of someone with the father's condition, and the health care costs associated with the condition.

[6] Counsel for the Minister objected to the admission of the Hayer Report, on the grounds that it was not relevant to the request for special relief on humanitarian and compassionate grounds. Counsel for the Minister argued that the Hayer Report was an attempt to challenge the legality of the medical inadmissibility finding, and did not address humanitarian and compassionate factors.

[7] Counsel for the applicant responded that the Hayer Report was not presented to challenge the medical officer's opinion, but rather to provide all the circumstances regarding the prognosis and possible treatment for consideration in the humanitarian and compassionate analysis. Counsel for the applicant stated that he would link the Hayer Report to the testimony from the applicant regarding his plans for what he would do if the father came to Canada.

[8] After hearing from both parties, the Board decided to exclude the Hayer Report, stating the following as found in the hearing transcripts (Certified Tribunal Record, p 20):

> I will say that, in response to your second point that it's information for the panel to consider, you know, I tell you, Mr. Wong, I am concerned about that because it would be difficult for me to wonder -- not wonder -- whether I'm not being placed -- would not be placed in an invidious position. Another statement by a medical professional, however -- I'll use the term advisedly -- however general or even benign it might be and intended to help, it just gives me a great deal of concern, in part because the Act, as you know, in case law is very clear on how we're supposed to proceed and for that reason I am going to rule that we will not accept this as a piece of evidence.
>
> However, I will encourage you -- and I'm sure you understand this -- to do whatever you might in your examinations to make the cases because -- to make the case in respect of a humanitarian and compassionate ground, the one that you say you've already laid out in the earlier letter to Ms. Babcock.
> …

Decision Under Review

[9] The Board reviewed the background facts of the application, including the details of the applicant's relationship with his parents, and the location and situation of the parents and other members of the applicant's family. The Board also reviewed the applicant's evidence regarding the father's state of health.

[10] The Board noted that the only ground of appeal was whether there were sufficient humanitarian and compassionate considerations to warrant special relief in light of all the circumstances of the case. The Board cited *Lim v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 956, [2002] FCJ No 1250, at para 17, for the test in this analysis – whether there is undue, undeserved or disproportionate hardship.

[11] The Board found that there was no evidence that the father's condition had improved, and therefore no grounds to conclude that he would no longer be reasonably expected to cause excessive demands on health or social services in Canada pursuant to section 38(1)(*c*) of the Act. The Board noted that the Officer's opinion was cautionary – the father's condition may be stable for a period of time, but could deteriorate and cause excessive health care costs.

[12] The Board found, at paragraph 16 of its decision, that the relevant factors to be considered in the humanitarian and compassionate analysis were:

> …the extent of the demand on this country's health care system; whether there has been an improvement in the medical condition; the availability of medical care in the home country; the availability of family support in the foreign country; the potential benefit to the family; and the best interests of any child who might be affected by the decision.

[13] The Board then assessed the evidence on each of those factors. The Board found the potential demand on the health care system to be considerable, according to the Officer's statement. The Board found that there was no evidence to mitigate the opinion that the father might cause excessive health care costs.

[14] The Board found that the evidence showed that the father could receive appropriate medical care in India, and also that he had support in India through family members. Regarding the benefit to the family, the Board acknowledged the applicant's oral evidence of his close relationship to his parents; however, the Board found that this relationship had withstood long periods of separation and should be able to continue to do so.

[15] The Board considered the best interests of the applicant's son, and also to a lesser extent his nieces in Canada. The Board acknowledged the benefits for the children of having their grandparents in Canada, but found there was no disadvantage to the degree contemplated by the Act of the grandparents remaining in India.

[16] The Board found that the evidence did not support the applicant's contention that he would need to travel frequently to India to care for his parents if the application were refused. The Board found the parents to live a comfortable life in India with support relatively nearby. Thus, the Board concluded that the Officer's refusal was valid in law, and there were insufficient humanitarian and compassionate considerations on which to allow the appeal.

Issues

[17] The Court finds that the issues raised by the parties can be reframed as follows:

a. Was the Board's decision unreasonable, either because of the exclusion of the Hayer Report or because of its consideration of the best interests of the children?

Statutory Provisions

[18] The following provisions of the *Immigration and Refugee Protection Act* are applicable in these proceedings:

Division 4	Section 4
Inadmissibility	Interdictions de territoire
Health grounds	Motifs sanitaires
38. (1) A foreign national is inadmissible on health grounds if their health condition (*a*) is likely to be a danger to public health; (*b*) is likely to be a danger to public safety; or (*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.

Division 7	Section 7
Right of Appeal	Droit d'appel
Right to appeal — visa refusal of family class	Droit d'appel : visa
63. (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the	**63.** (1) Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial

family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.

…

peut interjeter appel du refus de délivrer le visa de résident permanent.

[…]

Appeal allowed

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

(*a*) the decision appealed is wrong in law or fact or mixed law and fact;

(*b*) a principle of natural justice has not been observed; or

(*c*) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

…

Fondement de l'appel

67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;

b) il y a eu manquement à un principe de justice naturelle;

c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[…]

Part 4
Immigration and Refugee Board

Partie 4
Commission de l'immigration et du statut de réfugié

Immigration Appeal Division

Section d'appel de l'immigration

Proceedings

Fonctionnement

175. (1) The Immigration Appeal Division, in any proceeding before it,	**175.** (1) Dans toute affaire dont elle est saisie, la Section d'appel de l'immigration :
(*a*) must, in the case of an appeal under subsection 63(4), hold a hearing;	*a*) dispose de l'appel formé au titre du paragraphe 63(4) par la tenue d'une audience;
(*b*) is not bound by any legal or technical rules of evidence; and	*b*) n'est pas liée par les règles légales ou techniques de présentation de la preuve;
(*c*) may receive and base a decision on evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances.	*c*) peut recevoir les éléments qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder sur eux sa décision.
…	[…]

Standard of Review

[19] The parties agree that the Board's analysis of the best interests of the children is to be reviewed on a standard of reasonableness. The Court also agrees with this position: the consideration of the best interests of the children is one element of the weighing process in a humanitarian and compassionate analysis, and is deserving of deference upon review (see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339).

[20] The applicant contends that the exclusion of the Hayer Report was a breach of procedural fairness, and therefore is reviewable on a correctness standard (*Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392). The respondent disagrees with this characterization, and argues that the exclusion of the Hayer Report was done according to the Board's rules for hearing procedure, and since this is a specialized area of law, it should be reviewed on a standard of reasonableness.

[21] The Court finds that the appropriate standard of review in this context is reasonableness. This was not a case of the Board fettering its discretion, as it did not erroneously apply strict rules of evidence; rather, the Board decided whether to consider a piece of evidence, or in other words, whether a piece of evidence was relevant to the appeal. This is a question of fact and is owed deference (see *Gil v Canada (Minister of Citizenship and Immigration)* (1999), 172 FTR 255, 1 Imm LR (3d) 294 [*Gil*], at para 12). The Court therefore agrees with the respondent that in the present case the standard of review is reasonableness. Thus, the Court is not concerned with whether the Officer's decision was correct, but rather "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 SCR 190, at para 47).

Arguments

Position of the Applicant

[22] The applicant submits that the Board breached the rules of procedural fairness by deciding to exclude the Hayer Report, and by failing to give reasons for that decision. The applicant also submits that the Board gave insufficient consideration to the best interests of the children affected by its decision.

[23] The applicant notes that, pursuant to section 175(1) of the Act, the Board is not bound by strict rules of evidence, and can consider any evidence that it considers credible and trustworthy. The applicant submits that the Board erred by imposing strict rules of evidence in its decision to exclude the Hayer Report.

[24] The applicant submits that by finding that it could not consider the Hayer Report, the Board fettered its discretion, which is a breach of procedural fairness (*Singh v Canada (Minister of Citizenship and Immigration)*, 2011 FC 813, [2011] FCJ No 1014). The applicant relies on the Federal Court of Appeal's decision in *Fajardo v Canada (Minister of Employment and Immigration)* (FCA), [1993], 157 NR 392, 21 Imm LR (2d) 113, which states at para 4: "… It is not for the Refugee Division to impose on itself or claimants evidentiary fetters of which Parliament has freed them". The applicant emphasizes that this reasoning has been applied equally to the Immigration Appeal Division (*Gil*, above).

[25] The applicant submits that the Board failed to make any determination on the relevance of the Hayer Report to the humanitarian and compassionate analysis. The applicant contends that, as demonstrated by the hearing transcripts, the Board's reasons for excluding the Hayer Report are unintelligible – the Board mentions being put in an invidious position, and mentions that the case law is clear on how to proceed, but does not cite any case law.

[26] The applicant also submits that, after excluding the Hayer Report, the Board encouraged the applicant's counsel to make the point for which the Hayer Report was submitted through examination of the applicant. However, the Board cut the applicant's counsel off from questioning the father's medical condition, stating that the applicant was "not really qualified to say anything on that score…". Thus, the applicant was prevented from presenting his evidence both through the Hayer Report and through oral testimony.

[27] Relying on the decision in *Parmar v Canada (Minister of Citizenship and Immigration)*, 2010 FC 723, 370 F.T.R. 306, at paras 44 to 47, the applicant argues that the Board's exclusion of the Hayer Report does not meet the test for sufficiency of reasons. The applicant notes that the Board's written decision makes no mention of the decision to exclude the Hayer Report, and therefore offers no reasoning for this decision, thus breaching procedural fairness (*Kawtharani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 162, 146 ACWS (3d) 338).

[28] Finally, the applicant submits that the Board failed to be alert, alive and sensitive to the best interests of the children affected by its decision (*Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165, 323 FTR 181). The applicant argues that, according to the decision in *Lewis v Canada (Minister of Citizenship and Immigration)*, 2008 FC 790, [2008] FCJ No 990 [*Lewis*], at para 11, the children's best interests must be well-defined and identified by the decision-maker. The applicant relies on this Court's decisions in *Lewis*, above, and *E.B. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 110, 96 Imm LR (3d) 66, which both held that any hardships to children must be considered, and not just unusual, undeserved or disproportionate hardships.

[29] The applicant contends that the Board failed to properly identify the best interests of the children affected by its decision, and therefore erred according to the analysis from *Lewis*, above, at para 11. The applicant submits that the Board found that the level of hardship to the children did not amount to "the order contemplated by the Act", which is contrary to the principle that any hardship to children must be considered. The applicant therefore submits that the Board's analysis of the best interests of the children was unreasonable.

Position of the Respondent

[30] The respondent submits that the Board's decision to exclude the Hayer Report was reasonable, and there was no breach of procedural fairness as it explained that decision orally at the hearing. The respondent also submits that the Board's consideration of the best interests of the children was reasonable, and the applicant's arguments amount to a request to re-weigh the evidence.

[31] The respondent argues that the Board considered the Hayer Report, and concluded that it could be construed as a 'back-door assault' on the legal validity of the medical opinion, which the applicant was not contesting in the appeal. The respondent submits that this finding was reasonable, since the main conclusion of the Hayer Report is that the father's condition would likely not result in significant health care costs. The respondent argues that, since the applicant was not challenging the medical opinion, it was not open to the applicant to present new evidence that would minimize the cost of the treatment for the father's condition.

[32] The respondent submits that the Hayer Report did not address any of the humanitarian and compassionate factors associated with medical treatment, and appeared to contradict the original medical assessment. Therefore, the Board was reasonable to exclude it as irrelevant to the humanitarian and compassionate analysis.

[33] The respondent submits that the Board did not need to refer to the Hayer Report in its written decision, since it had been excluded as evidence at the hearing and was not considered in the decision. The respondent argues that the applicant was not left in doubt as to the reasons for

excluding the Hayer Report, as it was explained at the hearing. Thus, the failure to refer to the Hayer Report in the final decision was reasonable and not an error.

[34] The respondent submits that the applicant's arguments regarding the best interests of the children amount to a request to re-weigh the evidence, which is not the proper purview of the Court upon judicial review. The respondent argues that to require the Board to first explicitly identify the children's best interests before analyzing whether they were threatened would be to elevate form over substance (*Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, 297 NR 187, at para 3).

[35] The respondent submits that the Board considered the children's best interests, and found that they would not be adversely affected if their grandparents did not come to Canada. The respondent contends this was well within the range of reasonable outcomes, given that the decision did not deprive the children of anything, but rather maintained the *status quo* – the relationship between the children and their grandparents would remain the same as before.

[36] The respondent emphasizes that the Board acknowledged the potential cultural benefits of the grandparents' presence in the children's lives, but the Board noted that the children already had exposure to the Indian culture and language through their parents. Thus, the Board found no significant hardship if the application was refused, and this conclusion was reasonable.

Analysis

[37] At hearing before this Court, the applicant emphasized its submissions on the admissibility of the Hayer Report.

[38] As a preliminary remark, the Courts notes that the applicant's attempt to frame the insufficiency of the Board's reasons as a breach of procedural fairness has to be interpreted in light of the Supreme Court of Canada's recent decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] SCJ No 62, at paras 20 to 22. In that decision, Justice Abella clarified that, while there is a requirement under the duty of fairness to give reasons in some contexts, the adequacy of the reasons is properly analyzed in the context of the reasonableness of the decision itself:

> [20] Procedural fairness was not raised either before the reviewing judge or the Court of Appeal and it can be easily disposed of here. *Baker* stands for the proposition that "in certain circumstances", the duty of procedural fairness will require "some form of reasons" for a decision (para. 43). It did not say that reasons were *always* required, and it did not say that the *quality* of those reasons is a question of procedural fairness. In fact, after finding that reasons were required in the circumstances, the Court in *Baker* concluded that the mere notes of an immigration officer were sufficient to fulfil the duty of fairness (para. 44).
>
> [21] It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review. As Professor Philip Bryden has warned, "courts must be careful not to confuse a finding that a tribunal's reasoning process is inadequately revealed with disagreement over the conclusions reached by the tribunal on the evidence before it" ("Standards of Review and Sufficiency of Reasons: Some Practical Considerations" (2006), 19 *C.J.A.L.P.* 191, at p. 217; see also Grant Huscroft, "The Duty of Fairness: From Nicholson to Baker and Beyond", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (2008), 115, at p. 136).

> [22] It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.

[39] Thus, the Court finds that there was no breach of procedural fairness in this case. The Court does not accept the applicant's suggestion that the Board was required to refer to the exclusion of the Hayer Report in its final decision – rather, it was sufficient to make the decision orally during the hearing, as the Board did. The Court also does not find that the Board fettered its discretion by applying the strict rules of evidence – the Board gave no indication it was under the impression it must apply strict rules of evidence; rather, it decided whether this particular piece of evidence could be considered. The key question for the Court to determine is whether the Board's decision was unreasonable because of its exclusion of the Hayer Report.

[40] Following a review of the material and arguments of both parties, the Court finds that the Board's exclusion of the Hayer Report rendered its decision unreasonable.

[41] Indeed, and contrary to the respondent's submissions, the Court finds that the applicant was left in complete doubt as to the reason why the Hayer Report was excluded. The Board's oral decision to exclude the Hayer Report is reproduced for ease of reference (Certified Tribunal Record, p 20):

> I will say that, in response to your second point that it's information for the panel to consider, you know, I tell you, Mr. Wong, I am concerned about that because it would be difficult for me to wonder -- not wonder -- whether I'm not being placed -- would not be placed in an invidious position. Another statement by a medical professional, however -- I'll use the term advisedly -- however

> general or even benign it might be and intended to help, it just gives me a great deal of concern, in part because the Act, as you know, in case law is very clear on how we're supposed to proceed and for that reason I am going to rule that we will not accept this as a piece of evidence.

[42] As both parties agree, the Board was entitled to consider any relevant evidence that it found credible and trustworthy in the circumstances – thus, the question before the Board was whether the Hayer Report was credible, trustworthy, and relevant to its determination of the humanitarian and compassionate application. However, as the applicant submits, the Board's reasons for excluding the Hayer Report are limited to a reference to being placed in an "invidious position", and a vague reference to the Act and case law without any citation. In these circumstances, the applicant – and the Court – is left to wonder on what basis the Hayer Report was excluded.

[43] Some reasoning for the exclusion of the Hayer Report was necessary, given that in its final decision the Board identified the extent of the health care costs of the father's condition as a relevant factor in its humanitarian and compassionate analysis (Board's decision, para 16). The Hayer Report spoke directly to the likely potential health care costs of the father's condition – which was a relevant consideration, according to the Board's own analysis – and therefore the Board was unreasonable to refuse to consider the Hayer Report as part of its analysis of this factor, rendering its decision unreasonable.

[44] Thus, on the ground that the Hayer Report was unreasonably excluded as evidence, the Court finds that the decision must be set aside and the matter referred back to the Board for re-determination by a different panel.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, and the matter is referred back to the Board for re-determination by a different panel. No question of general importance is certified.

"Richard Boivin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4943-11
STYLE OF CAUSE:	Mahesh Parmar v MCI
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DATED:	February 2, 2012

APPEARANCES:

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