Federal Court  Cour fédérale

Date: 20150326

Docket: IMM-7922-13

Citation: 2015 FC 385

Toronto, Ontario, March 26, 2015

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

SOVEENA AMJAD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review of a decision of an Officer of the Immigration Section of the High Commissioner of Canada in London, England, dated November 8, 2013, rejecting the Applicant's application for a permanent resident visa on the basis that an accompanying member, her son, was inadmissible because his likely demands on Canadian health and social services would be excessive. The son would be inadmissible under the provisions of subsection 38(1)(c) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA").

[2] The Applicant is an adult female person, a citizen of Pakistan. In 2009, she submitted an application for permanent residence in Canada under the Federal Skilled Worker Class. She included her husband and two sons in the application. On August 9, 2013, she received a letter from a Visa Officer who raised the health condition of one of her sons ("Wasae"), then about ten years old, who had a condition described as cerebral palsy with global development delay.

[3] Citizenship and Immigration Canada received evaluations and reports provided by a Clinical Psychologist from The Children's Hospital in Lahore, Pakistan. Based on this material, an IMS Client Summary was prepared comprising several pages in which the child's medical condition was reviewed, his special education needs considered, and an estimated annual cost of care needed was produced; this together with a so-called fairness letter inviting submissions from the Applicant was sent by the High Commission.

[4] The Applicant, in reply, provided a signed Declaration of Ability and Willingness together with a five page letter addressing at least some of the concerns raised. Oddly, the response also included two decisions of Canadian Courts, *Hilewitz v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706 and *Colaco v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 282, although neither of them was addressed in the letter. No explanation, other than speculation, was provided as to why these cases were furnished.

[5] Following receipt of this material, a further medical report was created by a Medical Officer of the government which stated, in part:

> *I have reviewed the new material submitted as well as the entire medical file on this applicant. The information confirms the diagnosis and needs previously identified.*
>
> *The applicant's family submitted a declaration of Ability and Intent with a detailed plan to mitigate the cost identified. They have offered to make advance payment for the anticipated health care services.*
>
> *The proposed plan does not address all the needs that have been identified such [as] education. The Ontario legislation requires students to attend school until the age of 18 or graduation. As noted in the narrative written in November 2012, Wasae is likely to be identified as an exceptional student requiring special education. Under the Act, the Ministry of Education is responsible for ensuring that all exceptional children in Ontario have available to them appropriate special education programs and services without payment of fees.*
>
> *Therefore, it is my opinion that the new material does not modify the assessment of medical inadmissibility.*

[6] Having received the Applicant's response and the Medical Officer's report, the Officer at the High Commissioner made the following entry in the GCMS respecting the decision to refuse the application:

> *I HAVE REVEIWED THE RESPONSE TO OUR CONCERNS AND THE OPINION OF THE MEDICAL OFFICER.*
>
> *I AM NOT SATISFIED THAT THE APPLICANT HAS DEMONSTRATED THAT SHE HAS A DETAILED, VIABLE AND REALISTIC PLAN FOR MITIGATING THE COSTS OF HER SON'S CONDITION OVER TIME. SHE HAS NOT DEMONSTRATED THAT HER INTENTIONS CAN ACTUALLY BE PUT INTO PLACE. SHE HAS OFFERED TO MAKE A PRE-PAYMENT TO COVER COSTS OF CARE AND MEDICAL COSTS. THE MINISTRY OF EDUCATION IS RESPONSIBLE FOR ENSURING THAT ALL EXCEPTIONAL CHILDREN IN ONTARIO HAVE AVAILABLE TO THEM APPROPRIATE SPECIAL EDUCATION PROGRAMS AND SERVICES WITHOUT PAYMENT OF FEES. THERE THE OFFER DOES NOT ALTER THE BURDEN THAT MAY BE PUT ON EDUCATION AND HEALTH SERVICES.*

> *I AM NOT SATISFIED THAT [S]HE HAS DEMONSTRATED THE EXTENT TO WHICH THE MINISTRY OF HEALTH WILL BEAR THE COSTS OF WASAE'S SPECIAL NEEDS EDUCATION, OR HOW SHE WILL PROVIDE FOR THOSE SERVICES FOR HER SON ON A DAY-TO-DAY BASIS FOR THE PERIOD OF TIME THAT THEY ARE REQUIRED.*
>
> *HAVING FULLY REVIEWED THE INFORMATION AT HAND, I AM SATISFIED THAT WASAE'S HEALTH CONDITION CEREBRAL PALSY MIGHT REASONABLY BE EXPECTED TO CAUSE EXCESSIVE DEMAND ON HEALTH OR SOCIAL SERVICES IN CANADA. THE APPLICANT'S SON WASAE IS A PERSON DESCRIBED IN A38(1)(C) AND CONSEQUENTLY THE APPLICANT IS A PERSON DESCRIBED IN A42 AND IS INADMISSABLE. APPLICATION REFUSED.*

[7] The Applicant's Counsel raises two issues:

1. Did the Officer fail to conduct an individualized assessment of the type required by the Supreme Court in *Hilewitz*? On this point, it is agreed that the standard of review is correctness;
2. In the alternative, was the decision reasonable?

I. ISSUE 1

[8] The Supreme Court of Canada in *Hilewitz*, in reviewing the requirements of the provisions of the 1985 *Act* similar to that of IRPA, per Abella J. for the Court wrote at paragraph 54:

> *54 Section 19(1)(a)(ii) calls for an assessment of whether an applicant's health would cause or might reasonably be expected to cause excessive demands on Canada's social services. The term "excessive demands" is inherently evaluative and comparative. Without consideration of an applicant's ability and intention to pay for social services, it is impossible to determine realistically what "demands" will be made on Ontario's social services. The wording*

> *of the provision shows that medical officers must assess likely demands on social services, not mere eligibility for them.*

[9] Applicant's Counsel argues that a proper decision must demonstrate that the decision maker addressed demands on social services taking into account both medical and non-medical factors, such as the availability, scarcity and cost of publicly funded services, along with the willingness of the Applicant to pay for them. Counsel argues that the decision, which comprises of the medical report and GCMS notes quoted above, while addressing the Applicant's willingness to pay, and the services that could be provided by the Ontario government, fails to address any consideration of the Applicant's ability to pay as well as services which could be provided by private sector organizations without requiring taxpayer funds.

[10] The submissions of the Applicant, in response to the fairness letter, does provide information as to the Applicant's net worth, and shows that the Applicant contacted, by e-mail, several private sector service providers, two of whom responded but only to provide an acknowledgment and contact information. These responses do not provide any details as to any actual plan for private care for the boy. The response does not say that the Applicant or her husband has secured employment in Canada. The response says that any further assessment of the boy and his needs should await the relocation of the family in Canada.

[11] Applicant's Counsel argues that the Ontario legislation respecting education of children provides an exception for private education, and that this issue should have been addressed in the decision. Failure to address it, according to Counsel, constitutes a reviewable error on the

correctness standard. On the same standard, Counsel submits that failure to address the capacity to provide support constitutes a reviewable error.

[12] Respondent's Counsel argues that, while these points are not specifically mentioned in the decision, the materials in the record do not assist the Applicant. She and her husband have no apparent jobs to go to; their resources are not enormous; the evidence as to private education and assistance is non-existent beyond contact information.

[13] In considering the jurisprudence respecting the adequacy of reasons, the Courts are often stuck between the Scylla and Charybdis decisions of the Supreme Court of Canada, released one day apart, of *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62. Stratas J.A. of the Federal Court of Appeal in *Lemus v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 114 wrote a very careful decision dealing with both cases and concluding that "in this case" before that Court, the controlling authority was *Alberta Teachers*. The case before the Court was described at paragraphs 37 and 38 of his Reasons:

> *37 Therefore, I conclude that in this case, the controlling authority is Alberta Teachers' Association. It follows that it would not be appropriate, in this case, to accept the Minister's invitation and supplement or recast the Officer's reasons to save her decision.*
>
> *38 This is a situation where the Officer, informed by these reasons of her error and of the proper standard to be applied, might well reach a different result. There is evidence in the record that could support a decision either way. I cannot say that the record leans so heavily against relief that sending the matter back to the Officer would serve no useful purpose, as per MiningWatch Canada, supra. Nor can I say that the record is unequivocally in*

> *favour of relief allowing us to award mandamus and grant the subsection 25(1) application.*

[14] Justice Rennie, when he was in this Court, addressed a similar issue in *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431. He wrote at paragraphs 9 to 11:

> *9 The decision provides no insight into the agent's reasoning process. The agent merely stated her conclusion, without explanation. It is entirely unclear why the decision was reached.*
>
> *10 Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62, [2011] 3 SCR 708 does not save the decision. Newfoundland Nurses ensures that the focus of judicial review remains on the outcome or decision itself, and not the process by which that outcome was reached. Where readily apparent, evidentiary lacunae may be filled in when supported by the evidence, and logical inferences, implicit to the result but not expressly drawn. A reviewing court looks to the record with a view to upholding the decision.*
>
> *11 Newfoundland Nurses is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that Newfoundland Nurses, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. Newfoundland Nurses allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.*

[15] In the present case, there must be a measure of pragmatism in the approach taken by the Court. There is no doubt that *Hilewitz* says that certain matters are to be considered. The record shows evidence directed to those matters does not favour the Applicant. One suspects but does

not know whether the ability to pay or private sector assistance was in fact considered by the Officer. They are not mentioned in the decision.

[16] In looking at the record, there is nothing there that would have materially assisted the Applicant. The net worth of the Applicant says little, particularly since she has no job. The private sector information is nothing more than contact information and certainly not anything like a plan.

[17] The words of Evans J. (as he was then) in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 at paragraph 16 are particularly apt:

> *16 On the other hand, the reasons given by administrative agencies are not to be read hypercritically by a court (Medina v. Canada (Minister of Employment and Immigration) (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, Hassan v. Canada (Minister of Employment and Immigration) (1992), 147 N.R. 317 (F.C.A.). That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources. A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.*

[18] It must be remembered that persons such as the Applicant here are proposing themselves as immigrants to Canada, they were not invited or coerced to come. As such, they bear the burden of demonstrating that they, and those coming with them, are admissible and would not cause a burden. Canadian officials receive a vast number of such applications; they are under great pressure and overworked. Where it can be clearly demonstrated that something was

overlooked, for instance in the reasons that arguably would have assisted the Applicant, the Court cannot simply supply reasons that are not there. But where the reasons overlook something that would not have assisted the Applicant in any event, the Court should not impose an unnecessary burden on the Officials to redo a matter simply for legal propriety or pedantry.

[19] There is a discretion in the Court in applying the remedies afforded on judicial review. I will not return the matter simply because the Officer did not add a few words that would not have been of any assistance to the Applicant in any event.

II. ISSUE 2

[20] Was the decision reasonable? This is really the same question as Issue #1 but determined on the lesser standard of reasonableness. For this reasons already discussed, the decision in addition to being correct, also was reasonable.

III. CONCLUSION

[21] In the result, the application will be dismissed. No party requested a certified question.

[22] I would like to thank and commend both Counsel for the careful, thoughtful and effective manner in which this case was prepared and presented. It was exemplary.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application is dismissed;

2. No question is certified;

3. No Order as to costs.

"Roger T. Hughes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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