Federal Court  Cour fédérale

Date: 20090810

Docket: IMM-300-09

Citation: 2009 FC 807

Ottawa, Ontario, this 10th day of August 2009

Present: The Honourable Orville Frenette

BETWEEN:

ZOHREH VAZIRIZADEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") of a decision of the Immigration Appeal Division of the Immigration and Refugee Board (the "IAD") dated December 12, 2008 wherein it found that, pursuant to paragraph 67(1)(*c*) of the Act, there were insufficient humanitarian and

compassionate circumstances to warrant exercise of special relief in light of all the circumstances of the case.

II. The facts

[2] The applicant, a Canadian citizen who resides in Toronto with her husband and two children, sponsored her mother, Nahideh Vazirizadeh, age 70, a widow residing in Iran, for permanent status in Canada.

[3] The medical officer and the other medical evidence determined that the applicant's mother suffered from osteoarthritis of the knees, which would require knee replacement surgery within five to ten years. The medical evidence also showed that she had other ailments, was suffering from hypertension requiring medication and had degenerative osteoporosis of the thoracic vertebrae.

[4] In 2006, her medical doctor in Teheran, Iran, Dr. M. Rahbar, confirmed that she would require knee replacement surgery on both knees within five to six years. There are medical opinions on file from orthopaedic specialists in Canada stating that she will need left knee replacement surgery within two to three years from 2006.

[5] On March 4, 2007, the mother's application for permanent residence was refused by the visa officer on the grounds of medical inadmissibility under paragraph 38(1)(*c*) of the Act because her health condition "might reasonably be expected to cause excessive demand on health or social services" in Canada.

[6] On September 30, 2007, *i.e.* six months after the above decision, she underwent right knee replacement surgery in Iran. Her Iranian surgeon wrote a letter in which he states that his patient could use her right knee perfectly and that her left knee did not require replacement surgery.

[7] The applicant appealed the visa officer's decision to the IAD on the grounds of humanitarian and compassionate ("H&C") considerations under subsection 67(1) of the Act.

[8] In its decision of December 12, 2008, the IAD found there were insufficient H&C circumstances to justify the granting of special relief.

III. The impugned decision

[9] The applicant's mother has been refused a permanent resident visa by a visa officer who determined she was medically inadmissible to Canada under subsection 38(1) of the Act, based upon the determination of the Medical Notification signed by Dr. Valerie Hindle on October 23, 2006 that, because of osteoarthritis of both knees requiring surgery replacement within five to ten years from 2006, "she might reasonably be expected to cause excessive demand on health or social services".

[10] The IAD began its decision by quoting the appellant on the point that she did not challenge the legal validity of the refusal of a visa on medical grounds. In paragraph 7 of its decision, the IAD enunciates that the appellant's mother had suffered from osteoarthritis to both knees but that she underwent right knee replacement surgery in Iran on September 30, 2007. It further quotes from a letter of her orthopaedic specialist who states that "she is able to use her knee perfectly and do her

daily activities. As the case has subsided regarding her right knee, she requires no surgery of her left knee". The IAD notes that the appellant's mother is taking medication for high blood pressure.

[11] The IAD acknowledges that the appellant then argued that because her mother's medical inadmissibility had been "met or lessened", a lower threshold for granting relief was required. The IAD then discusses and analyzes the other H&C grounds, including the best interests of the grandchildren and the appellant's mother's ability to help care for them. The IAD considered that because of the wide discretionary powers given under paragraph 67(1)(*c*) of the Act, once the major obstacle to admissibility had been met or lessened, exercising such power objectively, dispassionately, having regard to all relevant factors, it then must decide if special relief can be granted.

[12] After considering all of the factors involved, the IAD then concluded the appeal could not be granted because there were insufficient H&C circumstances to justify it.

IV. The issue

[13] Is the IAD's decision wrong in fact and in law?

V. The standard of review

[14] It is established that decisions involving matters of fact or law applied to facts, are governed by the standard of reasonableness. On questions of law or of breach of procedural fairness or the rules of natural justice, the standard is one of correctness.

[15] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, and *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, reiterated that deference must be given to administrative decisions. In *Dunsmuir*, it provided guidance on the process to choose the appropriate standard of review. The first step is to examine the jurisprudence to see if the standard is applied to particular cases and only after a fruitless search, should a court analyse the four factors comprising the standard of review analysis. In the particular case of a visa officer's determination on medical inadmissibility, the case-law applies the standard of reasonableness (*Vashishat v. Minister of Citizenship and Immigration*, 2008 FC 1346; *Canada (Minister of Employment and Immigration) v. Burgon*, [1991] 3 F.C. 44 (F.C.A.)). Therefore, I shall apply the standard of reasonableness to the decision appealed from in the present case.

VI. Pertinent legislation

[16] Subsection 38(1) and paragraph 67(1)(*c*) of the Act read as follows:

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.
67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of, […] (*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.	**67.** (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé : [. . .] *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.

VII. Analysis

[17] The determination as to whether or not an overseas applicant is medically inadmissible is made by an immigration officer (or a visa officer), based on a medical opinion. In this case, the determination was made based upon a medical opinion of the condition of the applicant's mother on March 4, 2007, who then was considered inadmissible because of her medical condition at that time. This determination is not contested by the applicant but she claims the IAD erred because it did not consider the fact that the medical inadmissibility no longer existed since her mother had obtained the replacement surgery on her right knee after the decision.

[18] The applicant submits the IAD hearing which was a *de novo* hearing, did not consider the appellant's changed medical status. The respondent presented a two-fold argument against the applicant's submission. First, he contends that a simple reading of the decision shows that the IAD analyzed the medical condition both at the time of the visa officer's decision in 2007 and the IAD hearing in 2008, including the evidence of right knee replacement surgery, physiotherapy and the opinion of the appellant's orthopaedic specialist. However, the IAD reiterates or quotes the original medical opinion which, besides the likelihood of specialized knee replacement surgery, states the appellant's mother suffers from other medical problems, *i.e.* hypertension, obesity, osteoporosis and osteoarthritis, degenerative changes of the spine and hands and also degenerative osteoporosis of the thoracic vertebrae. Therefore the medical inadmissibility of the applicant's mother has not changed significantly since her right knee replacement surgery and with her ailments and age, they will, according to the overriding medical opinion, accentuate. Considering these facts, the applicant's submission on this point is factually erroneous because the surgical intervention has not corrected the other ailments the applicant's mother suffers from, some of which are degenerative.

[19] Secondly, the respondent pleads that the determination as to whether or not an overseas applicant is medically inadmissible can only be reversed by the IAD on *de novo* evidence that the visa officer's decision was incorrect at the time it was made or based on procedural fairness.

[20] In *Mohamed v. Canada (Minister of Employment and Immigration)*, [1986] 3 F.C. 90, the Federal Court of Appeal held it was the medical condition at the time the visa officer refused the visa that was the only relevant one and subsequent improvement in the medical condition was only relevant as to whether special relief should be granted on appeal.

[21] The same question had been answered in the same manner by the Federal Court of Appeal in *Shanker v. Canada (M.E.I.)*, [1987] F.C.J. No. 557 (QL) and *Canada (M.E.I.) v. Jiwanpuri* (1990), 109 N.R. 293. See also *Jugpall v. Canada (M.C.I.)*, 2 Imm. L.R. (3d) 222, at paragraph 25 and *Lao v. Canada (M.C.I.)*, 36 Imm. L.R. (2d) 265.

[22] I must conclude that the respondent's reasoning is the correct one.

[23] Here the applicant has not contested the visa officer's decision as to the medical inadmissibility at that time and the subsequent events or evidence do not challenge the decision.

[24] The applicant alleges that the IAD did not consider the totality of the information before it and her counsel's written application. She claims that as in the *Jugpall* case, *supra*, the IAD should have considered the reason for inadmissibility should be assessed first and then where the inadmissibility continues to exist, the H&C circumstances should be determined in a sliding scale. --

It should be noted here that the decision was rendered by the Immigration Appeal Division and the facts did not concern a medical inadmissibility. Furthermore, it is significantly distinguishable from the case at bar because the matter to be determined in *Jugpall* was "limited in time by the statute" to the year prior to the submission of the application. In the present case, medical inadmissibility is not statutorily limited in time under section 38 of the Act.

[25] The respondent answers that the IAD noted that the applicant did not challenge the legal validity of the visa officer's refusal on medical grounds before it proceeded to consider the case under paragraph 67(1)(*c*) of the Act, on H&C grounds. The respondent submits the IAD, in its reasons carefully weighed the totality of the evidence in the context of the H&C considerations, including the replacement surgery and the letter from the orthopaedic specialist in Iran. The IAD then assessed the H&C considerations, on a lower threshold in light of the current medical condition and circumstances of the applicant's mother. It concluded the factors in this case were neutral and exercising its discretion, it found there were insufficient circumstances present to grant special relief.

[26] The case-law is clear: unless an applicant can establish that the officer's or the IAD's decision of inadmissibility pursuant to subsection 38(1) of the Act, because it might reasonably be expected to cause an excessive demand on health or social services, is erroneous, an application for judicial review must be dismissed (*Newton-Juliard v. Canada (M.C.I.)*, 57 Imm. L.R. (3d) 15; *Kirec v. Minister of Citizenship and Immigration*, 2006 FC 800; *Airapetyan v. Minister of Citizenship and Immigration*, 2007 FC 42).

[27] In the present case, the visa officer's decision is uncontested by the applicant and the IAD decision considered all the pertinent facts including the right knee replacement surgery and the conflicting medical opinions about the left knee plus all the other ailments which the applicant's mother still suffers from.

[28] In my view, the decision is well founded in fact and in law and amply satisfies the test of falling within an acceptable range of reasonable decisions (*Dunsmuir, supra*) and has not met the test of the arguable case referred to in *Bains v. Canada (M.E.I.)* (1990), 109 N.R. 239 (F.C.A.).

[29] Therefore this application for judicial review must be dismissed.

[30] Counsel for the applicant raised the following questions for certification at the hearing, which were opposed by the respondent:

> Which test should the Panel Member of the Immigration Appeal Division (IAD) apply in cases where the Applicant was refused due to medical inadmissibility and in light of the fact that IAD hearings are hearings *de novo*:
>
> 1) TWO PART TEST: At the IAD hearing, should the Panel Member first determine whether the medical inadmissibility continues to exist (as described in s. 38 of the IRPA), and then
>
> a) if it does continue to exist, should the Panel Member then consider H&C factors?
> b) if it does NOT continue to exist (i.e. there is no more medical barrier to the Applicant's admissibility), should the Panel Member cease the assessment there? (No H&C review necessary)
>
> OR

> 2) SINGLE TEST: Or is the test simply to what degree has the medical impediment been lessened or overcome and thus, to what degree has it lessened the H&C considerations (the sliding scale)? NOTE: According to the ENF 19 – Appeals before the Immigration Appeal Division of the Immigration and Refugee Board, section 6, under the definition of "Humanitarian and Compassionate", this is the test for equity under H&C grounds.
>
> AND/OR
>
> 3) What does "wrong in law", in the context of section 67 of the IRPA mean and is it temporally limited (time of original refusal or time of IAD hearing)?

[31] I believe it is necessary to first review the law relating to certified questions in order to see if the test or conditions are met here.

[32] An appeal to the Federal Court of Appeal, in judicial review matters, is governed by section 74(*d*) of the Act which reads as follows:

74. Judicial review is subject to the following provisions: […] (*d*) an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.	**74.** Les règles suivantes s'appliquent à la demande de contrôle judiciaire : [. . .] *d*) le jugement consécutif au contrôle judiciaire n'est susceptible d'appel en Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci.

[33] In *Varela v. Minister of Citizenship and Immigration*, 2009 FCA 145, the Federal Court of Appeal reminded us that there is no right to judicial review unless leave is first granted by the Federal Court. This pre-condition forms part of what the Court of Appeal qualifies as a "gatekeeper provision":

> [27] An integral part of this scheme is the presence of two "gatekeeper" provisions. The first is the requirement that leave be obtained to commence an application for judicial review. The second is the absence of a right of appeal unless a judge of the Federal Court certifies that a serious question of general importance is raised by the application for judicial review. . . .

[34] A serious question is one that is dispositive of the appeal (see *Zazai v. Minister of Citizenship and Immigration*, 2004 FCA 89). In *Varela*, *supra*, Justice Denis Pelletier goes on to say, at paragraph 29, that it must be a serious question of general importance which arises from the issues in the case, and the judge who heard the case is in the best position to identify whether such a question arises on the facts of the case. If the judge has not seen fit to certify such a question, the pre-condition is not met and the exceptional right of appeal under section 74 does not exist (see *Denisov v. Minister of Citizenship and Immigration*, 2008 FC 550; *Gittens v. Minister of Public Safety and Emergency Preparedness*, 2008 FC 526, and *Varela*, *supra*, at paragraph 22).

[35] The applicant argues that although her mother was inadmissible at the time of the visa officer's negative decision, she was no longer inadmissible at the time of the IAD hearing (because of the right knee replacement surgery) which was a *de novo* hearing. She relies upon the IAD decision in *Jugpall* which, at paragraph 8, bases itself on the case of *Kahlon v. Canada (M.E.I.)* (1989), 7 Imm. L.R. (2d) 91 (F.C.A.) to state "which mandates the Appeal Division to conduct a hearing *de novo*, decision-makers would have considered the current financial circumstances of an appellant".

[36] In my view, the applicant makes fundamental errors in her reasoning on this point in that, first the IAD did consider the change in the medical status of her mother at the time of its hearing. However, it quoted at page 1 of its decision the reasons for the medical inadmissibility in the Medical Notification form, which recalls the other medical problems, *i.e.* "hypertension, osteoporosis with osteoarthritis degenerative changes of the spine and hands". There was no evidence at the time of the IAD hearing that these other medical problems had been eliminated. Therefore one cannot conclude that the basis of the inadmissibility had been removed.

[37] Second, the *Kahlon* decision was rendered in 1989, while the great majority of cases, including Federal Court of Appeal decisions, do not follow the *Kahlon* decision (see *Mohamed*, *supra*; *Uppal v. Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 565 (F.C.A.); *Jiwanpuri*, *supra*, and *Lao*, *supra*).

[38] It follows that, in my view, the applicant has not satisfied the conditions mentioned before to justify a certification of the questions raised above.

[39] There is no serious question of general importance raised in this case which would open a right of appeal to the Federal Court of Appeal.

JUDGMENT

The application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, of a decision of the Immigration Appeal Division of the Immigration and Refugee Board, dated December 12, 2008, is hereby dismissed.

No question is certified.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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