Federal Court  Cour fédérale

Date: 20130108

Docket: IMM-8494-11

Citation: 2012 FC 1523

Ottawa, Ontario, January 8, 2013

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

JAMES JOSEPH LAWRENCE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant was denied permanent residence in Canada under the Federal Skilled Worker program due to his son's medical condition. He seeks judicial review of that decision under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] When the applicant and his family underwent their mandatory medical exams, the physician noted that the applicant's son had developmental delay and moderate learning difficulties. When this was noticed in the applicant's file, the Medical Assessment Unit at the Canadian High Commission in London requested further details. These were provided, and on April 26, 2010 Dr.

Sylvain Bertrand, the Medical Officer in London, recorded his opinion that the boy, aged 15 at the time, was medically inadmissible.

[3] The average cost threshold for social services for an average Canadian child at that time was $5,143 per year. Dr. Bertrand assessed that the boy would require services amounting to between $98,500 and $126,500 over five years rather than the $25,715 average cost over five years. This was communicated to the applicant in a letter from the Visa Officer in London, Ms. Valerie Feldman, dated April 29, 2010.

[4] In response, the applicant provided a mitigation plan including personal financial information, letters of support promising financial or equivalent assistance, and evidence of contact with two Toronto area private schools. He did not dispute the medical diagnosis or the assessed cost of the required services.

[5] The Visa Officer did not send the applicant's plan to the Medical Officer for evaluation but assessed it herself. The Officer stated in her reasons that "The information in the submission is not medical (they do not contest the medical diagnosis) therefore this submission does not need to be reviewed by the medical officer." On September 14, 2011, the application was refused.

[6] On May 31, 2012, the Medical Officer signed an affidavit stating that: "Having now read the Applicant's response to Ms Feldman's "fairness letter", I confirm that my medical opinion remains unchanged."

[7] The applicant raised several issues with respect to the Visa Officer's decision including whether the officer's assessment of the adequacy of the applicant's plan was reasonable. An argument that there were special reasons for awarding costs in this matter was abandoned at the hearing. Having concluded that the officer erred in law by failing to submit the applicant's response to the fairness letter to the medical officer for evaluation, I do not consider it necessary to address the question of the reasonableness of the officer's decision with respect to the applicant's plan to address his child's needs.

[8] In *Sapru v Canada (MCI)*, 2010 FC 240 [*Sapru*] aff'd by 2011 FCA 35 [*Sapru FCA*] at paras 12-17, the Federal Court applied a standard of correctness to decisions by Visa Officers which turned on clear questions of law, relying on the Supreme Court of Canada's decision in *Hilewitz v. Canada (Minister of Citizenship and Immigration); De Jong v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 SCR 706 [*Hilewitz*]. In the present case, the question of whether the Visa Officer was obliged to refer the file to the Medical Officer is an issue of law which should be reviewed on a standard of correctness.

[9] The Supreme Court in *Hilewitz* had given guidance on the processing of visa applications for immigrants with health conditions which could create excessive demand on Canada's social services. Medical officers must assess the likely demands, taking into account both medical and non-medical factors. In response to *Hilewitz*, the Minister issued two operational bulletins to set out the policy on the matter

[10] In *Operational Bulletin 63* ("Assessing Excessive Demand on Social Services", September 24, 2008) [OB 63] it is provided that officers must consider the specific ability and intent of applicants who propose to reduce or eliminate the anticipated excessive demand. OB 63 requires applicants to demonstrate that the private purchase of the necessary services is actually possible in their province of intended residence and that they possess the resources to purchase them. OB 63 does not suggest that the Visa Officer has any discretion whether or not to consult the Medical Officer.

[11] A revised version of the bulletin issued on July 29, 2009 [OB 63B], states that the Visa Officer "should request the opinion of the medical officer if the applicant challenges the diagnosis or the required treatment; and, if warranted, seek the opinion of the medical officer on the nature of the plan and whether the services proposed are acceptable, within the Canadian context, considering the medical condition." This language was clearly intended to give the Visa Officer the discretion whether to seek the opinion of the medical officer on aspects of the applicant's plan that are non-medical in nature. Whether it can have that effect in light of the jurisprudence is at the heart of the controversy between the parties.

[12] In *Sapru*, above, at paragraph 23, I noted that the Supreme Court had addressed the issue by expressly stating at paragraph 70 of *Hilewitz* that the medical officers were obliged to consider all relevant factors, both medical and non-medical, such as the availability of the services and the anticipated need for them. The Federal Court of Appeal upheld that conclusion in paragraph 36 of *Sapru FCA* while setting aside the decision on another ground.

[13] The respondent argues that *Sapru FCA* does not create a universal obligation for the Visa Officer to send the Fairness Letter and any response to the Medical Officer in cases where the response does not concern medical matters. The Visa Officer, it submits, can consider non-medical submissions and determine the credibility or sufficiency of an applicant's mitigation plan, financial ability, and intent to pay privately for required social services.

[14] The requirements of procedural fairness should not be extended to the point where they serve no practical benefit, the respondent contends. Plans to mitigate the cost of excessive demands on Canadian social systems should be more than scant, incomplete or inchoate statements of what is intended. Here, the bulk of the applicant's response to the fairness letter consisted of information concerning his assets and the additional resources available to the family. Neither the diagnosis nor the estimated costs of the required services were contested.

[15] The Visa Officer considered that the applicant's plan was inadequate, in part because there was no indication of the nature of the schools in question nor whether either or both had agreed to accept the child. Medical officers are, as the Supreme Court found in *Hilewitz* at paras 54-55 and 70, intended to be the experts on how social services operate in the provinces**.** The Medical Officer in this case would have known that the named schools were fully private and that the child would have to be assessed by the schools in Canada before he could be admitted. The responsibility for providing an opinion on such matters was assigned by OB 63 to the Medical Officer. The Visa Officer acknowledges this in her affidavit but asserts that she did not think it was necessary in this case to consult the Medical Officer based on the wording of OB 63B.

[16] Officers' affidavits may be helpful to the Court in understanding the background and context in which a decision is made. But they cannot be used to bolster an officer's reasons for the decision, as was stated in *Sapru FCA* at paragraph 53. Here it is clear from the Visa Officer's notes to file which constitute her reasons along with the decision letter that she believed that anything non-medical relating to social services need not go to the Medical Officer. This was, in my view, an error of law that could not be cured by the subsequent review and declaration by the Medical Officer that he stood by his earlier opinion.

[17] The applicant opposed certification of a question on the ground that the law in this area was clear but suggested the following language if a question was to be certified:

> When a principal applicant in a response to a fairness letter does not dispute the medical diagnosis or medical prognosis or the cost estimates to provide social services is there an obligation on the immigration officer to refer the response to the medical officer for consideration and decision?

[18] The respondent took the position that this question does not appear to have been directly addressed thus far in the authorities. On that basis and with the understanding that it would be dispositive of an appeal in this matter, I will certify the question.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the application for judicial review is granted and the matter is remitted for reconsideration by a different Visa Officer;

2. there is no award of costs; and

3. the following question is certified as a serious question of general importance:

   When a principal applicant in a response to a fairness letter does not dispute the medical diagnosis or medical prognosis or the cost estimates to provide social services is there an obligation on the immigration officer to refer the response to the medical officer for consideration and decision?

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8494-11
STYLE OF CAUSE:	JAMES JOSEPH LAWRENCE AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 11, 2012
AMENDED REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	January 8, 2013

APPEARANCES:

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